UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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| JEFFREY PROVENZANO, THOMAS BENJAMIN and MONICA AGOSTO, on behalf of themselves and all others similarly situated, Plaintiffs, | : | Civil Action No. 1:07-CV-0746, LEK/RFT |
| -against- | : | |
| THE THOMSON CORPORATION and WEST PUBLISHING CORPORATION d/b/a BARBRI, Defendants. | : | |

**AUTHORITY CITED IN REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS AVAILABLE ONLY ON COMPUTERIZED DATABASES**

1. Bavaria In'tl Aircraft Leasing GmbH v. Clayton, Dubilier & Rice, Inc.
   2003 WL 21767739 (S.D.N.Y. 2003)

2. Bildstein v. Mastercard Int'l, Inc.
   2005 WL 1324927 (S.D.N.Y. 2005)

3. Goldych v. Eli Lilly & Co.
   2006 WL 2038436 (N.D.N.Y. 2006)

4. Spagnola v. Chubb Corp.
   2007 WL 927198 (S.D.N.Y. 2007)

5. Weisbarth v. Geauga Park Dist.
   2007 WL 2403659 (6th Cir. 2007)

6. @Wireless Enters., Inc. v. AI Consulting, LLC
   2006 WL 3370696 (W.D.N.Y. 2006)

7. In re WorldCom, Inc. Secs. Litig.
   2006 WL 557149 (S.D.N.Y. 2006)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
BAVARIA INTERNATIONAL AIRCRAFT LEASING GMBH, a German Company, Plaintiff,
v.
CLAYTON, DUBILIER & RICE, INC.; Charles P. Pieper; and Does 1-50, inclusive,
Defendants.
**No. 03 Civ. 0377(NRB).**

July 30, 2003.

Buyer of aircraft from German manufacturer sued firm that was 75% owner of manufacturer, and firm's principal operating partner, seeking recovery of down payment lost when manufacturer went bankrupt. Defendants moved to dismiss. The District Court, Buchwald, J., held that: (1) there was no unjust enrichment of firm or partner; (2) firm was not liable for allegedly fraudulent or negligent statements of partner, made in his other capacity as chairman of manufacturer; and (3) partner did not negligently or fraudulently misrepresent condition of manufacturer.

Case dismissed.

West Headnotes

[1] **Implied and Constructive Contracts** ⚷**3**
205Hk3 Most Cited Cases
There was no unjust enrichment, under New York law, of firm that was 75% owner of German aircraft manufacturer, or principal operating partner of firm, when manufacturer went bankrupt without returning $1.2 million down payment on purchase of aircraft; there was no evidence that down payment had ever been in possession of firm or partner.

[2] **Partnership** ⚷**153(3)**
289k153(3) Most Cited Cases
Under New York law, firm that was 75% owner of German aircraft manufacturer was not liable for allegedly fraudulent or negligent statements of its principal operating partner, as to current and future prospects of manufacturer, when statements were made in partner's other capacity as chairman of manufacturer.

[3] **Corporations** ⚷**335**
101k335 Most Cited Cases

[3] **Fraud** ⚷**12**
184k12 Most Cited Cases
Even if message on German aircraft manufacturer's website could be attributed to chairman, he was not liable, under New York law, for allegedly false representations made on website that manufacturer had attained financial stability allowing it to proceed with aircraft development program; statement constituted expression of corporate optimism or opinion as to future events, that was not actionable.

[4] **Fraud** ⚷**12**
184k12 Most Cited Cases
Under New York law, chairman of German aircraft manufacturer did not fraudulently or negligently misrepresent its financial condition when he stated, in response to letter of inquiry received from customer, that program for aircraft ordered by customer was in excellent shape and that he was personally convinced that project would be successful; statement was nonactionable future prediction or opinion.

Paul M. O'Connor III, Kasowitz, Benson, Torres & Friedman, LLP, New York, New York, Jeffrey D. Lewin, Lynde Seldon II, Sullivan, Hill, Lewin, Rez & Engel, San Diego, California, for Plaintiff.

John H. Hall, Steven Klugman, Donald W. Hawthorne, Debevoise & Plimpton, New York, NY, for Defendants.

MEMORANDUM AND ORDER

BUCHWALD, J.

***1** Bavaria International Aircraft Leasing GmbH ("plaintiff" or "Bavaria") brings this action seeking compensatory and punitive damages in connection with a refundable deposit it made to purchase six aircraft from a German manufacturer, Fairchild Dornier GmbH ("FD"), which is now in bankruptcy in Germany. [FN1] Bavaria has brought this suit against Clayton, Dubilier & Rice, Inc. ("CD & R"), a 75% owner of FD, and Charles Pieper ("Pieper"), the Chairman of FD and the principal operating partner of CD & R. Bavaria alleges that defendants Pieper and CD & R fraudulently concealed and misrepresented the financial condition of FD, causing

Bavaria to lose its $1.2 million deposit when FD went into bankruptcy. Presently before the court is defendants' motion to dismiss the Complaint pursuant to Fed.R.Civ.P. 9(b) and 12(b)(6). [FN2] Oral argument on this motion was held on July 1, 2003. For the following reasons, defendants' motion is granted.

FN1. FD has not been named as a defendant in this case.

FN2. Plaintiff also argues without any specific proposal, that, in the event the Court grants defendants' motion, it should be permitted leave to amend its complaint to rectify any pleading deficiencies we determine exist. Early on in the case, we received a letter from defendants outlining their proposed motion to dismiss. Thereafter, we specifically allowed plaintiff a chance to amend its complaint prior to the briefing of this motion and we forewarned plaintiff that it should be prepared to stand on its complaint, amended or not, once defendants proceeded with their motion. Under these circumstances, we decline to give plaintiff a third bite at the apple.

BACKGROUND [FN3]

FN3. The facts recited in this section are taken from Bavaria's Complaint and are assumed to be true pursuant to Fed.R.Civ.P. 12(b)(6).

On or about May 31, 2000 Bavaria signed a written proposal to purchase six new aircraft at a price of $140,900,000 from FD and made a deposit in the amount of $1.2 million to purchase these airplanes. The proposal provided that "Seller will refund the Deposit to Purchaser (without interest) and this Proposal will lapse in the event that Seller and Purchaser do not execute the Purchase Agreement or mutually agree to an extension on or before June 30, 2002." FD went into bankruptcy in Germany in April 2002 before entering into a final purchasing agreement with Bavaria and without returning the $1.2 million to the plaintiff.

Plaintiff alleges that between June 2000 and January 2002, CD & R, a 75% owner of FD, and Pieper, the principal operating partner of CD & R and the Chairman of FD, knew or should have known that FD's financial condition was weak and deteriorating but caused or allowed FD to represent to Bavaria that FD was financially solvent and strong. Specifically, Bavaria claims that CD & R and Pieper failed to disclose a number of significant facts about FD's financial condition, including that it lost nearly 1,000,000,000 Deutschemarks [FN4] in its fiscal year ending September 2000 and had negative capital that year; that FD's business plan, revised in or about October 2000, showed that it had little margin for error and was seeking an additional financing of $30,000,000; and, that FD lost 165,100,000 Euros in its fiscal year ending September 2001 and had negative capital of 477,000,000 Euros at that time. Moreover, plaintiff alleges that CD & R and Pieper allegedly knew but did not disclose until as late as February 2002, that FD had concluded in 2001 that it needed an additional $870,000,000 to complete the development of the airplanes, and, that FD had concluded after September 11, 2001, that this sum was not enough and that it would have to find a strategic partner.

FN4. To avoid further confusion, we note that the currency references in the complaint alternate between Euros, U.S. Dollars, and Deutschemarks.

Bavaria alleges that in mid-Jan 2002, upon reading in the press that FD might be having some financial difficulties, it sent a letter dated January 17, 2002, to Pieper, as the Chairman of FD, stating that it had learned that FD's development costs were not covered and that FD was looking for additional funds to finance those development programs. *See* Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. B. As part of this letter, Bavaria also asked to meet with Pieper for an update on FD's situation, its measures to secure further financing for the development of the airplanes, and Pieper's expectations about the market for these new jets. Pieper responded by letter dated January 28, 2002, *see* Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. A., in which he agreed to meet with Bavaria, providing assurances "[in the meantime] ... that [FD] and the [jet] program are in excellent shape" and that Pieper was "personally convinced that the [jet] project will become one of the most successful aircraft every launched." Two weeks later, on February 13, 2002, Pieper met with representatives of Bavaria at Bavaria's headquarters in Munich, and, according to the plaintiff, provided further reassurances that FD was financially sound and that Bavaria had nothing to worry about. Allegedly in reliance on these representations, Bavaria did not ask FD to refund or place in escrow its $1.2 million deposit.

***2** Seven weeks later, on March 21, 2002, at FD's "rollout" of the jet program, which Bavaria attended, Piper referred to "speculation about the company's future in recent days", their inability to "predict what the ultimate structure of the [FD] business will be" and the need for "adequate long term financing and the right strategic partner" for FD, but allegedly continued to conceal FD's true financial condition.

Finally, in March 2002, Bavaria asked FD to transfer Bavaria's $1 .2 million deposit into an escrow account. However, FD did not refund or escrow the deposit. Two weeks later on or about April 3, 2002, FD filed for bankruptcy in Germany.

On January 16, 2003, Bavaria commenced this action against CD & R and Pieper claiming fraud, negligent misrepresentation, and unjust enrichment. On April 4, 2003 defendants moved to dismiss plaintiff's Complaint in its entirety.

*DISCUSSION*

I. Legal Standard

A. Fed.R.Civ.P. 12(b)(6)

In considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), we accept as true all material factual allegations in the complaint, *Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l Ltd.,* 968 F.2d 196, 198 (2d Cir.1992), and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Still v. DeBuono,* 101 F.3d 888, 891 (2d Cir.1996) (citing *Conley v. Gibson,* 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In addition to the facts set forth in the complaint, we may also consider documents attached thereto and incorporated by reference therein, *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.,* 155 F.3d 59, 67 (2d. Cir.1998), as well as matters of public record, *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 75 (2d. Cir.1998).

B. Fed.R.Civ.P. 9(b)

Because this is a fraud cause, in order to withstand defendants' motion to dismiss, Bavaria's Complaint must also meet the particularity requirements under Fed.R.Civ.P. 9(b). Indeed, Rule 9(b) requires that a plaintiff allege: "(1) the specific statement or omission; (2) the aspect of the statement or omission that makes it false or misleading; (3) when the statement was made; (4) where the statement was made; and (5) which defendant was responsible for the statement or omission." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.,* 85 F.Supp.2d 282, 293 (S.D.N.Y.2000), *aff'd* 242 F.3d 366 (2d Cir.2001).

II. Unjust Enrichment

[1] We turn first to plaintiff's claim that the defendants were unjustly enriched by plaintiff's $1.2 million dollar deposit. New York law [FN5] is clear that "[a] claim for unjust enrichment requires a plaintiff to allege that the defendant has already been enriched." *Mina Inv. Holdings Ltd. v. Lefkowitz,* 51 F.Supp.2d 486, 489 (S.D.N.Y.1999) (citation omitted). *See also* *Dolmetta v. Uintah Nat'l Corp.,* 712 F.2d 15, 20 (2d Cir.1983) ("To recover on a theory of unjust enrichment a plaintiff must prove that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to the plaintiff.") In the instant case, plaintiff maintains that because FD retained its deposit, defendant CD & R, as a 75% owner of FD, and Piper, the principal operating partner of CD & R, unjustly benefitted from plaintiff's loss. We are unpersuaded by this argument as it is clear that Bavaria's deposit stayed at all times with FD, the party with which it had an agreement and against which it has a contractual claim for the return of those funds. [FN6] As Bavaria has not alleged that either CD & R or Pieper ever had possession of plaintiff's deposit at any time, plaintiff's unjust enrichment claim must be dismissed against these defendants.

FN5. At oral argument held on July 1, 2002, the Court raised *sua sponte* the issue of whether New York law, as opposed to German law, would be applicable to the facts of this case. In response to the Court's inquiry, defendants' counsel suggested that, in fact, it believed German law to be the applicable law, but was willing to accept for purposes of this motion that German law is similar to New York law on the stated causes of action. As both parties have briefed this motion applying New York law, we too, will accept that New York law applies for purposes of this motion.

FN6. By letter dated July 1, 2003, responding to the Court's inquiry at oral argument as to whether Bavaria had filed a claim in the FD bankruptcy proceeding in Germany, Bavaria indicated that on August

15, 2002 it had registered its claim in the sum of $1,228.373.66 in the FD bankruptcy. However, Bavaria maintains that it was told by the FD insolvency administrator at a hearing in the matter that there was no "quota" for payment of unsecured creditors such as Bavaria and that there was not likely to be any such "quota" in the future because the secured claims with priority were likely to receive the entirety of the estate.

III. Negligent Misrepresentation and Fraud

***3** Next, we turn to plaintiff's negligent misrepresentation and fraud claims. The law is clear that to state a claim for fraud under New York law, Bavaria must allege "(1) misrepresentation of material fact; (2) intent to defraud or scienter; (3) justifiable reliance upon the misrepresentation; and (4) damages suffered as a result of such reliance." *World Wide Communications, Inc. v. Rozar,* 96 Civ. 1056, 1997 U.S. Dist. LEXIS 20596, at *17-18 (S.D.N . Y. Dec. 30, 1997) (citing *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.,* 98 F.3d 13, 19 (2d Cir.1996)). In the negligent misrepresentation area, plaintiff must allege that "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." *Hydro Investors Inc. v. Trafalgar Power, Inc.,* 227 F.3d 8, 20-21 (2d Cir.2000).

Applying these standards, we agree with the defendants that plaintiff has failed to allege actionable misrepresentation with respect to either CD & R or Pieper, and, accordingly, we dismiss plaintiff's fraud and negligent misrepresentation claims with respect to both of these defendants. We first address plaintiff's claims against CD & R, and then turn to plaintiff's claims against Pieper.

A. CD & R

[2] Bavaria maintains that based on the fact that CD & R owned 75% of FD, and that Pieper was the principal operating partner of CD & R and chairman of FD, it is axiomatic that "[i]n acting to further FD's interest, Pieper was also acting to further CD & R's interest." Pl.'s Mem. at 18. We disagree. The relationship between Pieper and CD & R, even when considered alongside the relationship between CD & R and FD, is not sufficient to state a claim against CD & R for Piper's conduct. Under the doctrine of respondeat superior, a corporation can be held liable for the acts of its officers and employees only when they are acting within the scope of their employment for the corporation. *See e.g., United States v. Davis,* 666 F.Supp. 641, 643 (S.D.N.Y.1987). Furthermore, it is a "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *United States v. Bestfoods,* 524 U.S. 51, 69, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) (citation omitted).

In the instant matter, Bavaria has failed to set forth any factual predicate that Pieper acted as CD & R's agent, as opposed to FD's agent, when he corresponded in writing and met with Bavaria about FD. Indeed, Bavaria alleges that when it had concerns about FD in January 2002, it "invited FD to a meeting" in its January 17, 2002 letter. Complaint ¶ 11. Bavaria's letter was addressed to Pieper as Chairman of FD, without any mention whatsoever of CD & R. *See* Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. B. Moreover, in response to Bavaria's letter of January 17, Pieper's January 28 letter was written on FD letterhead, signed by Pieper as the Chairman of that entity, and once again made no mention of CD & R. Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. A. Aside from its conclusory assertion that "CDR and Pieper continued to conceal FD's true financial condition from Bavaria" Compl. ¶ 12, Bavaria does not allege that CD & R had any role at the meeting at Bavaria's headquarters in Munich, and does not dispute that the March 21, 2002 rollout of the new jet was the rollout of FD's new product, not CD & R's. As "courts generally presume that directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary", *Bestfoods,* 524 U.S. at 69-70, and as Bavaria has not alleged anything to justify departing from this presumption, we decline to attribute Pieper's actions, in his capacity as Chairman of FD, to CD & R. Accordingly, we dismiss plaintiff's claims against CD & R for fraud and negligent misrepresentation.

B. Pieper

***4** As to plaintiff's fraud and negligent representation claims against Pieper himself, we find that all of the misrepresentations alleged in the complaint must be dismissed as they either (1) cannot be attributed to Pieper or (2) are simply not actionable under New York law. As an initial matter, we note that we are unpersuaded by Bavaria's suggestion that, rather than specifically examining each allegation of fraud or negligent misrepresentation, we must read the entire complaint as "one single integrated claim for relief", conflating all affirmative statements and all "omissions of related facts" by Pieper, CD & R, and FD from March of 2000 until March 2002. Pl.'s Mem. at 3. Rather, the law is clear that where a complaint alleges several fraudulent statements or omissions, courts must examine each allegation to determine whether it independently satisfies the requirements for fraud under Rule 12(b)(6) and 9(b). *See* *AIG Global Securities Lending Corp. v. Banc of America Securities LLC*, 254 F.Supp.2d 373, 382, n. 2 (S.D.N.Y.2003) (rejecting plaintiff's argument that in deciding whether to dismiss the complaint under Fed.R.Civ.P. 9(b) the court must consider whether the "overall impression" conveyed by the defendants was misleading and explaining that "[t]he Court of Appeals has made clear that specific factual allegations must exist in a Complaint, and that these specific statements or omissions are to be individually analyzed in order to determine whether the plaintiff has pleaded fraud with particularity."). *See also* *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 812 (2d Cir.1996) (conducting a Rule 9(b) analysis with respect to "statements at issue"). Accordingly, in order to independently analyze each of Bavaria's allegations with respect to Pieper, we separate the alleged misstatements and omissions into two distinct time periods: (1) June 2000 until January 2002; and (2) January 2002 until March 2002

i. June 2000 until January 2002

[3] Bavaria alleges that, as a general matter, between June 2000 and January 2002, Pieper "knew or should have known that FD's financial condition was weak and deteriorating, but ... nevertheless continuously and repeatedly *caused or allowed* FD (1) to represent ... that FD was financially solvent and strong and (2) to induce Bavaria to continue to negotiate the Purchase Agreement." Compl. ¶ 9 (emphasis added). However, the only specific example of "misrepresentation" which Bavaria points to during this time period is the text of FD's website, which appeared "as late as 2002" and stated that, "[t]oday under the leadership of Charles P. Pieper, [FD] has achieved the financial stability that will allow the company to move forward with the development of the [jet] program." *Id.* As an initial matter, we note that there is no indication that this "misrepresentation" is attributable to Pieper. The notion that Pieper, in some unexplained way, "caused or allowed" FD to misrepresent its future financial stability is not sufficient to withstand scrutiny under Rule 9(b).

***5** Moreover, even if the the message on FD's website could be attributed to Pieper, we are not persuaded that this statement conveyed anything more than an expression of corporate optimism and/or an opinion as to future events. Under New York law, it is clear that such statements cannot support a fraud claim. *See e .g.*, *Zanani v. Savad*, 630 N.Y.S.2d 89,90, 217 A.D.2d 696, 696-97 (2d Dept.1995) ("[A] representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud."); *DH Cattle Holdings Co. v. Smith*, 607 N.Y.S.2d 227, 331, 195 A.D.2d 202, 208 (1st Dept.1994) (holding that defendant's statement that a tax shelter was "a safe investment" was a non-actionable statement of "mere opinion and puffery.") *Accord* *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1217- 19 (1st Cir.1996) (finding that statements that a company was "very healthy", "basically on track", that the transition to a new product was "going reasonably well", and that the company "should show progress quarter to quarter, year over year" could not support a fraud claim as such statements were "immaterial as a matter of law."); *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 212 (4th Cir.1994) (holding that a statement that the defendant company was "on target toward achieving the most profitable year in its history" was a "vague prediction" that was immaterial.) [FN7] Similarly, we find that the vague, optimistic statement on FD's website regarding the company's ability to "move forward" under Pieper's leadership is not actionable as a matter of law. [FN8]

FN7. We reject Bavaria's argument that cases discussing fraud under federal securities law are irrelevant to New York fraud law. The elements of common law fraud in New York are "substantially identical to those governing" fraud under federal securities law, and, accordingly, it has been held that "the identical analysis applies." *Morse v. Weingarten*, 777 F.Supp. 312, 319 (S.D.N.Y.1991).

FN8. To the extent that Bavaria's fraud claim is based on the theory that the statement on FD's website misrepresented its present, as well as its future financial situation, we note that the complaint says nothing about when this representation first became available on FD's website, for how long it was available, or when Bavaria relied on it. Indeed, the print-out of the website attached to the complaint is dated September 5, 2002, long after FD declared its insolvency. Thus, Bavaria has provided no factual predicate to support the argument that it reasonably relied on the website's proclamation of FD's "achieve[ment] [of] financial stability" at any point prior to FD's insolvency.

ii. January 2002 until March 2002

[4] Nor are we persuaded that Bavaria's complaint has alleged any actionable fraud or negligent misrepresentation attributable to Pieper between January and March 2002. Specifically, Bavaria alleges that during this period, Pieper misrepresented FD's financial situation both in his written correspondence with Bavaria and subsequently at an in-person meeting with Bavaria in Munich. On January 17, 2002, Bavaria wrote a letter to Pieper acknowledging that "it is not new to all of us that ... developments are not always going straight forward as desired and expected," as well as informing Pieper that it recently received information that "development costs of the [jet program] are not covered and that [FD] is looking for additional funds to finance the program." Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. B. As a result of this information, Bavaria's letter requested "an update ... about the present situation of [FD], its measures to secure the further development of the [jet] programs, and [its] expectation for the [jet] market in the next [sic] future." *Id.* Pieper responded via letter dated January 28, 2002, which stated in relevant part:

> Thank you for your letter dated January 17, 2002. We are very excited about the current situation of [FD] and the [jet program] and our expectations ... and I would be pleased to meet with you to discuss these subjects in detail.... In the meantime, please accept my assurances that [FD] and the [jet program] are in excellent shape and I am personally convinced that the ... project will be one of the most successful aircraft ever launched.

***6** Defs.' Mem. in Sup. of Mot. to Dismiss, Ex. A. Again, we agree with the defendants that insofar as Bavaria's letter made particular statements about FD's financial condition (namely that FD's development costs had not yet been covered and that it was looking for additional funds) Pieper's response did not dispute or even respond to such claims. Indeed, Pieper's letter cannot reasonably be construed as making any specific misrepresentation about FD's financial condition. Moreover, to the extent that the statements in Pieper's January 28, 2002 letter express his personal sense of optimism about FD's future and the success of the jet program, such statements are not actionable under the well-recognized rule discussed *supra* Section III(B)(i) that a "representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud." *Zanani v. Savad,* 630 N.Y.S.2d 89,90, 217 A.D.2d 696, 696-97 (2d Dept.1995). [FN9]

FN9. Additionally, we find it significant that, as an international aircraft leasing company, Bavaria was undisputably sophisticated in this area and even acknowledged in its own letter that it understood that the development of such a program is not always "straight forward" and does not always move along "as desired and expected." Given its admitted knowledge about the aircraft industry, combined with the specific information about FD's status which it received prior to writing the January 17 letter, we question how Bavaria could have justifiably relied on Pieper's short, vague, optimistic response in the absence of any further inquiry.

Nor are we convinced that Pieper's alleged "reassurance" of Bavaria two weeks later at the February 13, 2002 meeting in Munich that "FD was financially sound" and that "Bavaria had nothing to worry about" Compl. ¶ 12, [FN10] states an actionable claim for fraud or negligent misrepresentation. Without pointing to any particular statement made by Pieper at this meeting, Bavaria's allegation is too indefinite and/or immaterial to withstand Rule 9(b) scrutiny. In addition, we find it significant that plaintiff has alleged that Pieper did not disclose *before February 2002* the true extent of FD's financial difficulties--namely that it "needed an additional $870 million", that even this amount "was not enough", and that FD "would need to find a strategic partner in order to survive." *Id.* ¶ 10. Indeed, Bavaria apparently concedes that Pieper *did* disclose this information to Bavaria at or around the time of the February 2002 meeting. [FN11] Accordingly, because Bavaria alleges that it was told outright by February 2002 about FD's financial problems, Bavaria has failed to adequately plead that at the time of the Munich meeting or any time thereafter, there were *any* misstatements by Pieper regarding FD's situation on which plaintiff could have justifiably relied.

FN10. Bavaria does not allege that these were Pieper's actual words. Rather, Bavaria merely alleges that Pieper provided general reassurance regarding FD's financial situation. The above quotations are merely Bavaria's paraphrasing of Pieper's reassurances. *See* Compl. ¶ 12.

FN11. When defense counsel raised this argument at oral argument, plaintiff's counsel did not in any way dispute this assertion.

III. Fraudulent Concealment

Finally, while we do not read plaintiff's complaint as asserting a cause of action for fraudulent concealment, we address this claim briefly because of Bavaria's repeated allegations that the defendants concealed facts about "FD's true financial condition." Compl. ¶ ¶ 10, 12. In New York, "[a] claim for fraudulent concealment must ... allege a duty to disclose ... and similarly, omissions of material fact rise to level constituting fraud only where there is a duty to speak.... Such a duty may arise if (1) there is a fiduciary relationship between the parties; (2) one party makes a partial or ambiguous statement that requires additional disclosure to avoid misleading the other party; or (3) one party to a transaction possesses superior knowledge of the facts not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *World Wide Communications, Inc. v. Rozar,* 1997 U.S. Dist. LEXIS 20596, at * 18-19 (S.D.N.Y. Dec. 30, 1997) (internal citations and quotations omitted). In the instant case, Bavaria has not alleged that Pieper and/or CD & R owed any fiduciary duty to Pieper, that the defendants made a "partial or ambiguous" remark that could give rise to a duty to disclose, or that the defendants knew that Bavaria was "operating under a mistaken perception of material fact." *Remington Rand Corp. v. Amersterdam-Rotterdam Bank, N.V.,* 68 F.3d 1478, 1484 (2d Cir.1995). To the contrary, Bavaria's complaint alleges that it received knowledge as early as January 2002 that FD needed additional funds and that by February, 2002 it was informed by the defendants themselves that even this recapitalization was inadequate and that FD needed to find a strategic partner. Compl. ¶ 10. At no time does the complaint allege that Bavaria informed either defendant that it was proceeding on the basis of any particular belief about FD's finances. Thus, even assuming that Bavaria's intent was to assert a claim for fraudulent concealment, we would dismiss this claim as a matter of law.

*CONCLUSION*

*7 For the foregoing reasons we grant defendants CD & R and Pieper's motion to dismiss plaintiff's complaint in its entirety. The Clerk of the Court is respectfully requested to close this case on the Court's docket.

IT IS SO ORDERED.

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**H**
Bildstein v. MasterCard International, Inc.
S.D.N.Y.,2005.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Bernd BILDSTEIN, on Behalf of Himself and Others Similarly Situated, Plaintiff,
v.
MASTERCARD INTERNATIONAL, INCORPORATED, Defendant.
**No. 03 Civ.9826I(WHP).**

June 6, 2005.

Irving Bizar, Ballon Stoll Bader & Nadler P.C., New York, NY, for Plaintiff.
Jay N. Fastow, Theodore Allegaert, Weil, Gotshal & Manges LLP, New York, NY, for Defendant.

PAULEY, J.
***1** This putative class action concerns certain foreign currency conversion practices by MasterCard International Incorporated (“MasterCard” or “Defendant”). In his Second Amended Complaint (the “Complaint”), Bernd Bildstein (“Bildstein” or “Plaintiff”) alleges that MasterCard unlawfully charges cardholders an undisclosed Foreign Currency Transaction Fee (“FCTF”).[FN1] Plaintiff asserts claims for deceptive business practices under New York General Business Law (“GBL”) Section 349 and unjust enrichment under New York law.

FN1. Familiarity with this Court's prior Memorandum and Order is presumed. *See Bildstein v. MasterCard Int'l Inc.,* 329 F.Supp.2d 410 (S.D.N.Y.2004).

Presently before this Court is MasterCard's motion to dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim. For the reasons set forth below, MasterCard's motion to dismiss is denied.

MasterCard is a global credit card network that promotes “its Master[C]ard brand credit card for use in the United States and all over the world.” (Second Amended Complaint (“SAC”) ¶ 6.) Plaintiff alleges that MasterCard indirectly charges its cardholders a service fee of approximately one percent, the FCTF, for transactions in foreign currencies. (SAC ¶ 7.) The FCTF is part of the currency conversion rate charged to cardholders and is not disclosed by MasterCard in promotional material or monthly billing statements. (SAC ¶ 9.) As a result, cardholders who use their MasterCard brand credit card for foreign transactions are charged “more than the currency conversion rate applicable to that particular country and currency involved in the transaction” and therefore, “unknowingly paid millions of dollars for the FCTF.” (SAC ¶¶ 9, 16.)

Bildstein has been a MasterCard debit cardholder since September 1997. (SAC ¶ 1.) Beginning in 2000 and continuing through the filing of the Complaint, Bildstein used his MasterCard debit card in Mexico for certain transactions in Mexican Pesos. (SAC ¶ 12.) Bildstein contends that MasterCard assessed the FCTF in addition to the exchange rate on these charges and concealed the fee as part of the conversion rate. (SAC ¶ 12.) Had MasterCard disclosed the embedded fee, Bildstein argues that he would have sought other methods to exchange his currency for no fee or, a fee lower than the FCTF. (SAC ¶ 13.)

Bildstein filed his Second Amended Complaint on August 25, 2004 following this Court's earlier decision dismissing Plaintiff's Amended Complaint and granting leave to replead. The Complaint asserts two claims against MasterCard: (1) deceptive business practices under GBL Section 349

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; and (2) unjust enrichment. Defendant moves to dismiss the entire Complaint.

I. *Motion to Dismiss Standard*

In determining whether dismissal is appropriate under Rule 12(b)(6), the court must "accept as true the material facts alleged in the complaint and draw all reasonable inferences in [plaintiff's] favor." *Freedom Holdings Inc. v. Spitzer,* 357 F.3d 205, 216 (2d Cir.2004); *accordVelez v. Levy,* 401 F.3d 75, 80 (2d Cir.2005). Further, "[a] complaint cannot be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ' *Freedom Holdings Inc,* 357 F.3d at 216 (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)); *accordDabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 395 F.3d 25, 31 (2d Cir.2005). As such, " 'the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." ' *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York,* 375 F.3d 168, 176 (2d Cir.2004) (quoting *Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir.1980)); *accordVelez,* 401 F.3d at 80. On a motion to dismiss, the inquiry "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Eternity Global Master Fund Ltd.,* 375 F.3d at 177 (quoting *York v. Ass'n of the Bar,* 286 F.3d 122, 125 (2d Cir.2002).

II. *N.Y. General Business Law § 349*

***2** As fully set forth in this Court's prior decision, GBL Section 349 provides a private right of action for consumer fraud. *SeeBildstein,* 329 F.Supp.2d at 413;*Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.,* 155 F.Supp.2d 1, 25 (S.D.N.Y.2001) (citation omitted). Under Section 349, Bildstein must establish that: "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result."*Maurizio v. Goldsmith,* 230 F.3d 518, 521-22 (2d Cir.2000); *accordLava Trading Inc. v. Hartford Fire Ins. Co.,* No. 03 Civ. 7037(PKC), 2004 WL 555723, at *3 (S.D.N.Y. Mar. 19, 2004); *Blue Cross & Blue Shield of N.J. v. Philip Morris USA Inc.,* 3 N.Y.3d 200, 205-06 (2004); *Solomon v. Bell Atl. Corp.,* 9 A.D.3d 49, 51, 777 N.Y.S.2d 50, 54 (1st Dep't 2004). With respect to the injury requirement, a plaintiff must demonstrate " 'actual' injury to recover under the statute, though not necessarily pecuniary harm." *Stutman v. Chem. Bank,* 95 N.Y.2d 24, 29, (2000) (citation omitted).

MasterCard argues that Bildstein's Section 349 claim should be dismissed for Plaintiff's failure to plead facts establishing consumer-oriented conduct, actionable deception or actual injury. Accepting the facts pled in the Complaint as true and drawing all inferences in favor of Bildstein, this Court concludes that Plaintiff now states a Section 349 claim.

A. *Consumer-Oriented Conduct*

Section 349 broadly protects consumers from deceptive business practices conducted in New York. *See*N.Y. Gen. Bus. Law § 349 (McKinney 2004); *Pelman ex rel. Pelman v. McDonald's Corp.,* 396 F.3d 508, 511 (2d Cir.2005) ( " § 349 extends well beyond common-law fraud to cover a broad range of deceptive practices"); *Blue Cross & Blue Shield,* 3 N.Y.3d at 205 ("the scope of the statute is intentionally broad, applying to virtually all economic activity") (internal quotation marks and citations omitted). Under this statute, consumer-oriented conduct requires the allegation of "facts sufficient to show that the challenged conduct has "a broader impact on consumers at large,'*i.e.,* it 'potentially affects similarly situated consumers' in New York."*The Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. Ltd.,* No. 00 Civ. 9214(RWS), 2003 WL 1751780, at 15 (S.D.N.Y. Apr. 1, 2003) (quoting *S.F . K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp.,* 84 F.3d 629, 636 (2d Cir.1996)); *accordNew York v. Feldman,* 210 F.Supp.2d 294, 301 (S.D.N.Y.2002)

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(consumer-oriented "has been construed liberally").

Bildstein has satisfied that pleading requirement. The Complaint contains allegations that " Master[C]ard has spent millions of dollars promoting its Master[C]ard brand credit card for use in the United States and all over the world. Master[C]ard's promotion efforts include substantial efforts directed to the New York consumer."(SAC ¶ 6.) Plaintiff also alleges that "Master[C]ard began applying the FCTF to all transactions in which the transaction currency differs from the billing currency" and that MasterCard did not separately disclose "the FCTF in the promotional material directed to the New York consumer or in the billing statement sent to its credit card holders." (SAC ¶¶ 8, 9.) Finally, Bildstein asserts that he " brings this action on behalf of himself and all other persons who ... were subjected to hidden transaction charges which were buried in the 'conversion rate' and not disclosed to them" and consequently, " unknowingly paid millions of dollars for the FCTF." (SAC ¶¶ 14, 16.) Such allegations that MasterCard orchestrated a deceptive practice directed at Bildstein and others similarly situated amply demonstrate "a broader impact on consumers at large."*S.F.K.F.C., Inc.,* 84 F.3d at 636.

*3 Defendant's reliance on *Kraus v. Visa International Service Association,* No. 602168/2001, slip op. at 11 (N.Y.Sup.Ct. Apr. 9, 2002) is misplaced. (Defendant's Memorandum in Support of Motion to Dismiss ("Def.Mem.") at 11-12; Declaration of Theodore Allegaert Ex. A.) In *Kraus,* plaintiff alleged that Visa International Service Association ("Visa") charged a foreign exchange rate fee in excess of the amount set forth in his cardholder agreement with the issuing bank. *Kraus,* No. 602168/2001, slip op. at 1. The New York State Supreme Court dismissed plaintiff's Section 349 claim based on documentary evidence pursuant to New York C.P.L.R. 3211. Given the absence of consumer-directed conduct, the state court concluded that the issuing bank determined the disputed fee, not Visa. *Kraus,* No. 602168/2001, slip op. at 6.

In contrast, MasterCard's motion is not based on documentary evidence. Rather, it is a Rule 12(b)(6) motion to dismiss where the facts alleged in the complaint must be accepted as true and all reasonable inferences drawn in favor of Bildstein. *Grandon,* 147 F.3d at 188. Bildstein alleges that MasterCard determined the FCTF "should be at least one percent, and that it would be assessed as part of the currency conversion rate to all cardholders."(SAC ¶ 7.) Further, unlike *Kraus,* Bildstein alleges that MasterCard encouraged him to use the card for foreign currency transactions. These allegations, together with the allegations discussed above, sufficiently plead consumer-directed conduct.

Defendant's assertion that Bildstein must show direct contact with MasterCard to establish consumer-oriented conduct is unavailing. (Def. Mem. at 10.) Privity is not required to state a Section 349 claim. *SeeIn re Tertiary Butyl Ether Prods. Liab. Litig.,* 175 F.Supp.2d 593, 630-31 (S.D.N.Y.2001) ( "Indeed, there is no requirement of privity, and the victims of indirect injuries are permitted to sue under [Section 349].") (internal quotation marks and citation omitted). Accordingly, the Complaint amply pleads consumer-oriented conduct.

B. *Actionable Deception*

MasterCard also moves to dismiss the Section 349 claim based on Plaintiff's allegations of deception. (Def. Mem. at 7.) Under Section 349, " ' [d]eceptive acts' are defined objectively, as acts ' likely to mislead a reasonable consumer acting reasonably under the circumstances." ' *Boule v. Hutton,* 328 F.3d 84, 94 (2d Cir.2003) (quoting *Maurizio,* 230 F.3d at 521). Moreover, it is well established that omissions may provide the basis for such claims. *SeeOswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 26 (1995) ("objective definition of deceptive acts and practices" includes " misrepresentations or omissions"); *see alsoStutman,* 95 N.Y.2d at 29;*Solomon,* 9 A.D.3d at 52. Deceptive practices, however, "need not reach the level of common-law fraud to be actionable under [S]ection 349." *Boule,* 328 F.3d at 94 (quoting *Stutman,* 95 N.Y.2d at 29).

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***4** Bildstein has sufficiently pled deception by omission. Omission-based claims under Section 349 are appropriate "where the business alone possesses material information that is relevant to the consumer and fails to provide this information."*Oswego,* 85 N.Y.2d at 26. The Complaint alleges that MasterCard went "to great efforts to conceal the FCTF" by embedding it in the currency conversion rate and failing to disclose its existence. (SAC ¶ 9.) Bildstein further alleges that "no other fee is similarly [e]mbedded" and that "Master [C]ard was fully aware that disclosing the FCTF as a separate fee would cause the consumer not to use the Master[C]ard credit card."(SAC ¶ 11.) The Complaint therefore, alleges that MasterCard withheld material information from cardholders and effectively pleads omission-based deception.FN2

FN2. Defendant also argues that Section 349 should be interpreted in accord with the disclosure requirements of Regulation Z, 12 C.F.R. § 226.5 and the Truth in Lending Act, 15U.S.C. § 1601*et seq.* Because these statutes impose no disclosure obligations on MasterCard, Defendant contends that Bildstein cannot state an omission-based claim under Section 349. (Def. Mem. at 10.) Defendant's position is untenable. Bildstein has asserted a Section 349 claim against MasterCard irrespective of these federal statutes. *SeeFischer v. MasterCard Int'l, Inc.,* No. 03 Civ. 2111(WHP), 2003 WL 22110169, at *3 (S.D.N.Y. Sept. 11, 2003) (remanding case with § 349 claim where plaintiff alleged no federal claims and disavowed reliance on federal law to interpret § 349).

C. *Actual Injury*

This Court addressed the actual injury requirement of a Section 349 claim at length in its prior decision. *SeeBildstein,* 329 F.Supp.2d at 415-16. To survive a motion to dismiss, plaintiff must plead injury separate and distinct from the alleged deception. *SeeSmall v. Lorillard Tobacco Co.,* 94 N.Y.2d 43, 56 (1999) (plaintiff may not assert " deception as both act and injury"); *Donahue v. Ferolito, Vultaggio & Sons,* 13 A.D.3d 77, 78 (1st Dep't 2004); *Sokoloff v. Town Sports Int'l, Inc.,* 6 A.D.3d 185, 186, 778 N.Y.S.2d 9, 10 (1st Dep't 2004). Previously, this Court dismissed Plaintiff's Amended Complaint as "bereft of any allegation that MasterCard failed to deliver the service Bildstein paid for ... or that MasterCard charged an inflated FCTF" and further provided that "[s]uch allegations would have been sufficient to state a claim under Section 349."*Bildstein,* 329 F.Supp.2d at 16. Despite Defendant's argument to the contrary, the Complaint does not suffer such fatal pleading deficiencies.

Bildstein alleges that his actual injury is the amount the FCTF exceeded the prevailing exchange rate at the time of his transactions in Pesos. (SAC ¶ 13.) He specifically asserts that MasterCard's failure to disclose the FCTF deprived him the opportunity to " pay for the purchases in American currency and pay only the foreign exchange rate;" convert "American currency into [P]esos before arriving in Mexico, and pay only the exchange rate;" and research " other credit cards to ascertain if they had an embedded FCTF in their exchange rate and a lower rate than Master[C]ard, or, possibly have found a credit card that did not charge a FCTF at all."(SAC ¶ 13.) These allegations adequately plead harm beyond the claimed deception. Based on the above, Plaintiff has sufficiently stated a claim under Section 349.

III. *Unjust Enrichment*

Defendant also moves to dismiss Plaintiff's unjust enrichment claim. In New York, unjust enrichment requires "proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.,* 373 F.3d 296, 306 (2d Cir.2004); *accordGolden Pac. Bancorp v. FDIC,* 375 F.3d 196, 203 n. 8 (2d Cir.2004). The Complaint alleges that MasterCard collected the FCTF, which exceeded the prevailing exchange rate, from unknowing cardholders pursuant to a manipulative practice of

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nondisclosure. (SAC at ¶¶ 7, 9, 11, 13.) Construing all reasonable inferences in favor of Plaintiff, the Complaint states a claim for unjust enrichment.

*5 Nevertheless, Defendant argues that Plaintiff cannot state a claim for unjust enrichment where a contract governs the subject matter at issue. (Def. Mem. at 13-14.) MasterCard contends that Plaintiff entered an agreement with his card issuing bank thereby barring his unjust enrichment claim. Although MasterCard correctly observes that an enforceable contract generally precludes recovery in quasi contract, that rule does not apply here. *See Bazak Int'l v. Tarrant Apparel Group,* 347 F.Supp.2d 1, 4 (S.D.N.Y.2004) (contract precludes unjust enrichment claim based on same subject matter); *Shady Records, Inc. v. Source Enters., Inc.,* 351 F.Supp.2d 74, 78 (S.D.N.Y.2004).

Bildstein's agreement with his card issuing bank cannot preclude Plaintiff's unjust enrichment claim against MasterCard, a non-party to that agreement. *SeeEUA Cogenex Corp. v. N. Rockland Centr. School Dist.,* 124 F.Supp.2d 861, 873 (S.D.N.Y.2000) (unjust enrichment "applies in the absence of an express agreement"); *Hochman v. LaRea,* 14 A.D.3d 653, 789 N.Y.S.2d 300, 302 (2d Dep't 2005) ("where ... there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract"); *Zuccarini v. Ziff-Davis Media, Inc.,* 306 A.D.2d 404, 405, 762 N.Y.S.2d 621 (2d Dep't 2003). Accordingly, Bildstein states a claim for unjust enrichment.

MasterCard further argues that the unjust enrichment claim should be dismissed for Plaintiff's failure to plead a relationship between the parties. Whether New York law imposes a nexus requirement to state a claim for unjust enrichment is unsettled. *Compare Reading Int'l, Inc. v. Oaktree Capital Mgmt.,* 317 F.Supp.2d 301, 333-34 (S.D.N.Y.2003) (claims for unjust enrichment " clearly contemplate that a defendant and plaintiff must have had some type of direct dealings or an actual, substantive relationship") (quoting *In re Motel 6 Sec. Litig.,* Nos. 93 Civ. 2183, 2866(JFK), 1997 WL 154011, at *7 (S.D.N.Y. Apr. 2, 1997)), *with Dreick Finanz AG v. Sun,* No. 89 Civ. 4347(MBM), 1989 WL 96626, at *4 (S.D.N.Y. Aug. 14, 1989) (stating that unjust enrichment does not require "plaintiff and defendants to have had direct dealings with one another"); *see alsoCox v. Microsoft Corp.,* 8. A.D.3d 39, 40-41, 778 N.Y.S.2d 147 (1st Dep't 2004) (direct dealing not required to state a claim for unjust enrichment). This Court need not decide whether a nexus must be shown as the Complaint sufficiently pleads a relationship between Bildstein and MasterCard to state a claim. Bildstein alleges that he held a MasterCard debit card since 1997 and during that time, MasterCard collected the FCTF from him. (SAC ¶¶ 1, 12, 13.) These allegations, to the extent required, along with the allegations discussed above adequately state a claim for unjust enrichment under New York law.

For the reasons set forth above, MasterCard's motion to dismiss the Second Amended Complaint is denied.

S.D.N.Y.,2005.
Bildstein v. MasterCard International, Inc.
Not Reported in F.Supp.2d, 2005 WL 1324972 (S.D.N.Y.)

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C

United States District Court,
N.D. New York.
Victoria Bea GOLDYCH, individually and as surviving wife and administratrix of the estate of John J. Goldych, Jr., deceased, Plaintiff,
v.
ELI LILLY AND COMPANY, Defendant.
**No. 5:04-CV-1477 (GLS/GJD).**

July 19, 2006.

Michael E. Pederson, Esq., Weitz, Luxenberg Law Firm, New York, NY, for the Plaintiff.

David S. Howe, Esq., Hancock, Estabrook Law Firm, Syracuse, NY, for the Defendant.

***MEMORANDUM-DECISION AND ORDER***

GARY L. SHARPE, U.S. District Judge.

***I. Introduction***

***1** Eli Lilly and Company manufactures the prescription drug, Prozac. Alleging that Eli Lilly negligently failed to warn the public about Prozac's risk of suicidal ideation, Victoria Bea Goldych sued when her husband committed suicide after ingesting a generic equivalent manufactured by a non-party. Pending are Eli Lilly's motions to dismiss and for partial summary judgment. [FN1] *See Dkt. Nos. 31, 32.* For the reasons that follow, the motions are granted and the case is dismissed.

> FN1. Eli Lilly's motion for partial summary judgment seeks judgment as a matter of law on Goldych's first cause of action. *See Dkt. No. 31.* Its motion to dismiss seeks dismissal of the remaining causes of action. *See Dkt. No. 32.*

***II. Background***

In 2004, Goldych filed a state court complaint asserting seven causes of action: *Count I*-Negligence and/or Recklessness; *Count II*-Fraud; *Count III*-Fraudulent Concealment; *Count IV*-Negligent Misrepresentation; *Count V*-Deceptive Business Acts and Practices in Violation of Sections 349 and 350 of New York's General Business Law; *Count VI*-Loss of Consortium; and *Count VII*-Wrongful Death. Eli Lilly subsequently removed pursuant to 28 U.S.C. § 1441. *See Dkt. No. 1.*

Eli Lilly then filed a motion for partial summary judgment on Goldych's first cause of action and a motion to dismiss as to the remaining counts. *See Dkt. Nos. 31, 32.* After oral argument, the court reserved decision. *See Dkt. No. 59.*

**III.** ***Facts***

Decedent John J. Goldych was under the care of a psychiatrist who prescribed the use of "Prozac." *See Pl. Am. Compl.* ¶ *8, Dkt. No. 28.* Pursuant to his psychiatrist's advice, Goldych filled the prescription on several occasions. *See id.; see also Eli Lilly SMF* ¶ *1, Dkt. No. 31.* Although Prozac was prescribed, the pharmacy employed accepted standards and substituted the generic brand, fluoxetine, which was not manufactured by Eli Lilly. [FN2] *See Eli Lilly SMF* ¶ ¶ *1-2, Dkt. No. 31.* Goldych never ingested Eli Lilly's product, but the substitute was identical to Prozac. *See Pl. Am. Compl.* ¶ *8, Dkt. No. 28; see also Eli Lilly SMF* ¶ *3, Dkt. No. 31.* Goldych had no history of suicidal ideation or acts before the Prozac prescription or his ingestion of the generic substitute, fluoxetine. *See Pl. Am. Compl.* ¶ *65, Dkt. No. 28.*

> FN2. Decedent filled prescriptions for fluoxetine on August 16, 2001, September 22, 2001, November 5, 2001, December 31, 2001, February 26, 2002, July 11, 2003, August 9, 2003, and September 3, 2003. *Eli Lilly SMF* ¶ *1, Dkt. No. 31.*

On September 28, 2003, without warning, Goldych committed suicide by shooting himself in the head with a shotgun. *See Pl. Am. Compl.* ¶ *65, Dkt. No. 28.* A subsequent autopsy disclosed the presence of fluoxetine and bupropion (Wellbutrin SR) in his body. *See Pl. Am. Compl.* ¶ *72, Dkt. No. 28.* Prior to Goldych's suicide, Eli Lilly had not warned the public about Prozac's suicidal risks. *See Pl. Am. Compl.* ¶ *98, Dkt. No. 28.* However, since Goldych's suicide, the FDA has published two public health advisories and a black box warning noting that patients on Prozac should be alert for suicidal tendencies. *See Pl. Am. Compl.* ¶ *99, Dkt. No. 28.*

**IV.** ***Discussion***

**A.** ***Standard of Review***

**1. Motion to Dismiss Standard**

Rule 12(b)(6) provides that a cause of action shall be dismissed if a complaint fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In other words, the court should dismiss the complaint pursuant to Rule 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the complaint which would entitle him to relief." *Twombly v. Bell Atl. Corp.,* 425 F.3d 99, 106 (2d Cir.2005) (internal quotation marks and citation omitted). "A court's task in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *AmBase Corp. v. City Investing Co. Liquidating Trust,* 326 F.3d 63, 72 (2d Cir.2003) (internal quotation marks and citation omitted). Therefore, in reviewing a motion to dismiss, a court "must accept the facts alleged in the complaint as true and construe all reasonable inferences in [the plaintiff's] favor." *Fowlkes v. Adamec,* 432 F.3d 90, 95 (2d Cir.2005) (citation omitted).

**2. Motion for Summary Judgment Standard**

***2** Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986) (citing Fed.R.Civ.P. 56(c)); *Globecon Group, LLC v. Hartford Fire Ins. Co.,* 434 F.3d 165,170 (2d Cir.2006) (citation omitted). All reasonable inferences must be drawn in favor of the nonmoving party. *See Allen v. Coughlin,* 64 F.3d 77, 79 (2d Cir.1995). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (citation omitted); *see also SEC v. Kern,* 425 F.3d 143, 147 (2d Cir.2005). "A 'genuine' dispute over a material fact only arises if the evidence would allow a reasonable jury to return a verdict for the nonmoving party." *Dister v. Cont'l Group, Inc.,* 859 F.2d 1108, 1114 (2d Cir.1988) (citation omitted). However, "[c]onclusory allegations, conjecture and speculation ... are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.,* 156 F.3d 396, 400 (2d Cir.1998).

**B. *Eli Lilly's Motions***

The central issue is whether a prescription drug manufacturer can be liable for death caused by another company's generic equivalent. In its motion to dismiss, Eli Lilly contends that Goldych's claims for fraud, fraudulent concealment, and negligent misrepresentation fail because New York law does not allow recovery for injuries caused by defective products under these theories. Eli Lilly argues that by bringing these claims, Goldych is "masking" claims more appropriately pled under products liability law in order to avoid pleading the elements of a products liability action. [FN3]

FN3. Under settled New York law, "the plaintiff in a products liability case bears the burden of establishing that a defect in the product was a substantial factor in causing the injury." *Sita v. Danek Med., Inc.,* 43 F.Supp.2d 245, 252 (E.D.N.Y.1999) (internal quotation marks and citation omitted). "New York courts have held that a 'defectively designed' product is one which at the time it leaves the [manufacturer]'s hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use." *Hinkley v. Safepro, Inc.,* 853 F.Supp. 594, 596 (N.D.N.Y.1994). "[T]he plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." *Arnold v. Krause, Inc.,* 232 F.R.D. 58, 72 (W.D.N.Y.2004) (internal quotation marks and citation omitted). Further, the manufacturer's breach of its duty to exercise reasonable care must be the proximate cause of the plaintiff's injuries. *See id.* The elements of a products liability claim naturally assume that the defendant manufacturer actually manufactured the product. Additionally, "[i]n a design defect case, there is almost no difference between a *prima facie* case in negligence and one in strict liability." *Bah v. Nordson Corp.,* 00-CV-9060, 2005 U.S. Dist. LEXIS 15683, at *37-38 (S.D.N.Y. Aug. 1, 2005) (internal quotation marks and citation omitted).

In its separate motion for partial summary judgment, [FN4] Eli Lilly argues that Goldych's First Count for negligence and/or recklessness should be dismissed because she cannot prove that the decedent was injured by an Eli Lilly product. More specifically, Eli Lilly maintains that Goldych cannot prove the basic elements of a negligence claim, [FN5] *i.e.,* that it owed a duty to Goldych or that it was the cause-in-fact and proximate cause of her damages.

FN4. In their brief 7.1 statement of material facts, the parties agree on the following three facts: (1) decedent filled prescriptions for fluoxetine on several occasions during 2001, 2002, and 2003; (2) decedent's prescriptions for fluoxetine were filled with generic fluoxetine that was not manufactured by Eli Lilly; and (3) decedent did not ingest fluoxetine manufactured by Eli Lilly. *See Eli Lilly SMF* ¶ ¶ *1-3, Dkt. No. 31.* Eli Lilly maintains that on these undisputed facts, it is entitled to judgment as a matter of law because Goldych cannot prove the essential elements of a negligence action.

FN5. Generally, New York law requires that a plaintiff in a negligence action establish: "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Walker v. United States,* 95-CV-6567, 1998 U.S. Dist. LEXIS 8380, at *3 (S.D.N.Y. June 8, 1998) (citing *Solomon v. City of New York,* 66 N.Y.2d 1026, 1027 (1985)). "In New York, the existence of a duty is a legal, policy-laden declaration reserved for judges." *Fagan v. AmerisourceBergen Corp.,* 356 F.Supp.2d 198, 206 (E.D.N.Y.2004) (internal quotation marks and citation omitted). In proving the duty element,

[t]he plaintiff must establish not only that a defendant owed a general duty of care to society as a whole, but also that the defendant owed a specific duty running to the particular plaintiff.... In order to determine the existence of a duty in New York, the court should consider and balance the following five factors: (1) the reasonable expectations of the parties and society generally; (2) the proliferation of claims; (3) the likelihood of unlimited or insurer-like liability; (4) disproportionate risk and reparation allocation; and (5) public policies affecting the expansion or limitation of new channels of liability.

*Id.* (internal quotation marks and citations omitted).

While Eli Lilly brings two separate motions, they present the same legal issue. The court must consider whether a plaintiff can assert claims for negligence, negligent misrepresentation, fraud, and fraudulent concealment against a manufacturer of a product when its product was not the cause of that plaintiff's injuries. [FN6]

FN6. In both motions, Eli Lilly correctly maintains that if the other claims fail, as a matter of law, Goldych's derivative claims for loss of consortium and wrongful death also fail.

As this question is novel in New York, the court considers recent decisions in other jurisdictions to assist in predicting how the New York Court of Appeals would resolve this issue. The Fourth Circuit Court of Appeals and a district court in the Eastern District of Pennsylvania have recently addressed this precise issue, and the court looks to both decisions for guidance. In *Foster v. Am. Home Products Corp.,* 29 F.3d 165, 166 (4th Cir.1994), and *Colaccio v. Apotex,* 05-CV-5500, --- F.Supp.2d ----, 2006 WL 1443357, at *2 (E.D.Pa. May 25, 2006), respectively, both plaintiffs sued a brand name prescription drug manufacturer for deaths caused by another company's generic equivalent.

***3** The defendant in *Foster,* Wyeth, manufactured the brand name prescription drug, Phenergan. *See Foster,* 29 F.3d at 167. A licensed physician prescribed Phenergan for infant twins, Brandy and Bradley Foster, to treat their colic. *See id.* When filling the prescription, the pharmacy substituted the generic form of Phenargan, promethazine, which was manufactured and sold by My-K Laboratories, Inc. *See id.* Promethazine was the bioequivalent of Phenargan. *See id.* After several doses of promethazine, six-week-old Brandy Foster was found dead in her crib. *See id.* Brandy Foster's death was attributed to her ingestion of promethazine. *See id.* Brandy Foster's parents sued Wyeth, the Phenergan manufacturer, for the injuries caused by My-K's generic version, promethazine.

After dismissing the Fosters' claims for negligence, strict liability, and breach of warranty, the district court allowed them to proceed with a claim for negligent misrepresentation. *See id.* Holding that "the allegations of negligent misrepresentation are an effort to recover the injuries caused by a product without meeting the requirements the law imposes in products liability actions[,]" the Fourth Circuit Court of Appeals reversed the district court's decision. *Id.* at 168. The Fourth Circuit found that a plaintiff seeking recovery for injuries caused by a product must demonstrate that the defendant manufactured the product at issue. *See id.* Because it was impossible to prove that Wyeth manufactured the generic drug, the Circuit dismissed the negligent misrepresentation claim. *See id.*

The district court in *Colaccio* confronted a factual landscape indistinguishable from that faced by this court. *See* Colaccio, 2006 WL 1443357, at *2. The plaintiff in *Colaccio* sued GlaxoSmithKline after his wife ingested a generic version of its antidepressant drug, Paxil, and thereafter committed suicide. [FN7] *See id.* The plaintiff asserted claims based on a failure-to-warn theory, reasoning that the warnings, which were published by GlaxoSmithKline, were inadequate to inform users of the suicide risks associated with the drug. *See id.* The labeling was prepared solely by the brand name manufacturer, GlaxoSmithKline, and adopted verbatim by Apotex, the generic manufacturer. *See id.*

> FN7. Unlike Goldych, Colaccio also sued the generic drug manufacturer, Apotex. *See Colaccio v. Apotex,* 05-CV-5500, 2006 WL 1443357, at *2 (E.D.Pa. May 25, 2006).

Here, the decedent ingested fluoxetine, the generic form of Prozac, and took his own life. Fluoxetine is manufactured by Teva Pharmaceuticals, an Israeli company. In each of her seven alleged theories, Goldych seeks to assign liability to Eli Lilly for a defective product that it did not make or manufacture.

*Foster* and *Colaccio* provide in-depth analyses in support of their refusal to extend liability to brand name manufacturers, and the court turns to that rationale.

**1. *Foster***

In *Foster,* the Fourth Circuit cited policy reasons as support for its refusal to extend liability to a brand name manufacturer for injuries caused by a generic manufacturer's product. Generic manufacturers are not required to perform safety and effectiveness studies on drugs that are the bioequivalent [FN8] of another FDA approved drug. *See* Foster, 29 F.3d at 169. However, this does not prevent generic drug manufacturers from altering a drug's labeling "[t]o add or strengthen a contraindication, warning, precaution or adverse reaction or to delete false, misleading or unsupported indications for use or claims for effectiveness without prior FDA approval." *Id.*

> FN8. "Bioequivalence exists when there is no significant difference between the rate and extent of absorption of two drugs with the same active ingredients administered at the same molar dose under similar experimental conditions, or when a difference in the extent of absorption in such circumstances is not medically significant and certain other requirements are met." *Foster,* 29 F.3d at 169 n. 3 (*citing* 21 U.S.C.A. § 355(j)(7)(B) (West Supp.1994)).

*4 The Fourth Circuit explained that "for economic reasons, generic manufacturers accept without question the studies performed by name brand manufacturers and simply copy verbatim the name brand drugs' package circulars." *Id.* Although generic manufacturers do not actively advertise, they still generate sales when pharmacists substitute generic drugs for name brand prescriptions to cut costs for the customer. For this reason, a "generic manufacturer [can be held] responsible for negligent misrepresentations on its product labels if it did not initially formulate the warnings and representations itself.... [A] manufacturer of generic products is responsible for the accuracy of labels placed on its products." *Id.*

When a generic manufacturer blindly accepts the brand name manufacturer's warnings and representations, it does so at its own risk. *See id.* "In cases involving products alleged to be defective due to inadequate warnings, 'the manufacturer is held to the knowledge and skill of an expert.... The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.' " *Id.* at 169-170 (citing *Owens-Illinois v. Zenobia,* 601 A.2d 633, 639 (Md.1992)). Likewise, as an expert, a generic manufacturer is responsible for the accuracy of labels placed on its products. *See id.*

Goldych's claims for negligence, fraud, fraudulent concealment, and negligent misrepresentation assume that Eli Lilly owed her a duty under New York law. Like the plaintiffs in *Foster,* Goldych maintains that Eli Lilly owed her a duty because it was foreseeable that misrepresentations regarding Prozac could result in personal injury to users of Prozac's generic bioequivalents.

*Foster* held that "to impose a duty ... would be to stretch the concept of foreseeability too far." *Id.* at 171. In alleging a claim for negligent misrepresentation under New York law, "a plaintiff must establish reliance upon a false statement or material misrepresentation or omission[,][and] ... the alleged misrepresentation must have been made by the defendant to the plaintiff." *Prohaska v. Sofamor, S.N.C.,* 138 F.Supp.2d 422, 447 (W.D.N.Y.2001). Moreover, "claims of fraudulent concealment and negligent misrepresentation also require the plaintiff to demonstrate the existence of a special relationship of trust or confidence between the parties giving rise to a duty to impart correct information[.]" *Rose v. Am. Tobacco Co.,* No. 101996/2002, 2004 WL 986239, at *5 (N.Y.Sup.Ct. Feb. 20, 2004). A duty arises when there is "such a relation that one party has the right to rely for information upon the other, and the other giving the information owes a duty to give it with care." *Foster,* 29 F .3d at 171. In *Foster,* the court found that no such relationship existed between the parties because the plaintiff was injured by a product that the defendant did not manufacture. *See id.* Similarly, Goldych was injured by a product that Eli Lilly did not manufacture.

**2. *Colaccio***

***5** In *Colaccio,* the district court premised its holding on the conclusion that the plaintiff's failure to warn claims were impliedly preempted by FDA regulations. *See* Colaccio, 2006 WL 1443357, at *2. To the extent that *Colaccio* contains discussion and analysis of FDA preemption, the court does not rest its decision on this basis since it has not been briefed by the parties. [FN9] *See id.*

FN9. Eli Lilly concedes that at this late stage it "is not attempting to insert a preemption argument into its pending motions." *Eli Lilly Ltr. Brief, Dkt. No. 66.* For a detailed discussion of the federal regulatory process and the intersection between FDA regulations and generic drug manufacturer tort liability, *see Colaccio v. Apotex,* 05-CV-5500, --- F.Supp.2d ----, 2006 WL 1443357, at *4-18 (E.D.Pa. May 25, 2006).

The latter part of the *Colaccio* decision examines the duty of care that brand name manufacturers owe to consumers of generic manufacturers' products. Relying heavily on *Foster, Colaccio* succinctly states that "all products liability actions *require* proof that the defendant made the product to which the alleged injuries are attributable." [FN10] *Id.* at *20.

FN10. Notably, the medication at issue in *Colaccio* was prescribed in New York and the decedent filled the prescription and ingested the medication in New York. *See id.* at *3 n. 5. By joint stipulation, the parties agreed that "the law of New York and the law of Pennsylvania are not in conflict, and thus, the laws of Pennsylvania should be applied ..." to Counts I through IX. *Id.* The third count asserts a violation of New York Consumer Protection Law, to which New York law governs. *See id.* at *3.

Moreover, in discussing the persuasive weight given to *Foster* by other courts, *Colaccio* recognized that it was not bound by *Foster. See id.* at *21. Nevertheless, it noted that "a review of case law reveals that every state and federal district court which has confronted the issue of innovator drug-manufacturer liability has either adopted the *Foster* reasoning or cited *Foster* with approval." *Id.* at *20 (citing *Block v. Wyeth, Inc.,* 02-CV-1077, 2003 WL 203067, at *2 (N.D.Tex. Jan. 28, 2003); *DaCosta v. Novartis AG,* 01-CV-800, 2002 WL 31957424, at *9 (D.Or. Mar. 1, 2002); *Christian v. 3M,* 126 F.Supp.2d 951, 958 (D.Md.2001); *Miller v. Bristol-Myers Squibb Co.,* 121 F.Supp.2d 831, 836 (D.Md.2000); *Sharp v. Leichus,* 04- CA-643, 2006 WL 515532, at *4 (Fla.Cir.Ct. Feb. 17, 2006); *Kelly v. Wyeth,* 03-CV-3314, 2005 WL 4056740, at *2 (Super.Ct.Mass. May 6, 2005); *Beutella v. A.H. Robins Co., Inc.,* 05-CV-2372, 2001 WL 35669202, at *2 (Utah Dist.Ct. Dec. 10, 2001)).

*Colaccio* notes that Pennsylvania and Maryland law differ slightly regarding duty of care and the treatment of certain product liability theories. *See id.* at *21. Nevertheless, Colaccio focuses on the causal relationship between the defendant's product and the plaintiff's injury, an essential element governing products liability law in Pennsylvania and Maryland, *see id.,* as is also the case in New York.

*Colaccio* rejects the argument that public policy supports plaintiffs' claims. *See id.* In contrast, it explains that courts "have recognized the societal importance of new and effective prescription drugs ... [and] the need not to unduly burden the pharmaceutical industry with unfettered liability." *Id.* (citation omitted). Moreover, *Colaccio* reasons:

> ... the fact that Congress created the FDA in the first place, [coupled with] the statutory scheme embodied in the FDCA, demonstrates that it

believes the public interest is best served by the FDA's weighing of the risks and benefits of a particular prescription drug.

*Id.* Confident in its holding that a brand name manufacturer owes no duty of care to a plaintiff injured by another company's generic bioequivalent of its drug, *Colaccio* concludes that "even if th[e][c]ourt's conclusion regarding preemption were found to be improper, the claims against [the brand name manufacturer] must still be dismissed." *Id.* at *22.

**3. *Goldych***

***6** As the court has already observed, it must anticipate what the New York Court of Appeals would hold if it were faced with the nuances of this legal conundrum. New York law, like that of Maryland and Pennsylvania, requires a plaintiff seeking recovery for an injury caused by a defective product to prove that the defendant manufactured the product. *See* Hinkley v. Safepro, Inc., 853 F.Supp. 594, 596 (N.D.N.Y.1994) (holding that the *manufacturer* must ensure that the product is reasonably safe for its intended use). Goldych concedes that the decedent ingested fluoxetine, a generic substitute for Eli Lilly's drug, Prozac. In an effort to circumvent the requirements of product liability law, Goldych relies on other legal theories which find no support in the law. [FN11] She has failed to cite any case directly holding that one manufacturer can be held liable for injuries stemming from another manufacturer's product. [FN12]

FN11. "The elements of viable claims of affirmative fraud, fraudulent concealment, and negligent misrepresentation are similar." Rose, 2004 WL 986239, at *2. "The elements of a cause of action for ... fraud include: (1) representation of a material fact; (2) falsity; (3) scienter; (4) reasonable reliance; and (5) damages." *Neri v. R.J. Reynolds Tobacco Co.*, 98-CV-371, 2000 U.S. Dist. LEXIS 22223, at *17 (N.D.N.Y. Sept. 28, 2000). "Where ... the alleged fraudulent acts are the same acts underlying the negligence and strict products liability causes of action, *there is no distinct cause of action for fraud."* Cottonaro v. Southtowns Indus., Inc., 213 A.D.2d 993, 994 (4th Dept.1995) (emphasis added). In this case, a fraud cause of action is "merely another aspect of the negligence and strict liability causes of action." *Id.* (internal quotation marks and citation omitted).

FN12. Goldych cites *Standish-Parkin v. Lorillard Tobacco Co.* to support the proposition that claims for fraud, fraudulent concealment, and negligent misrepresentation can be maintained against manufacturers who never manufactured or sold the defective product used by the plaintiff. *See* Standish-Parkin v. Lorillard Tobacco Company, 12 A.D.3d 301 (1st Dept.2004). In *Standish,* the estate of a deceased smoker brought a wrongful death claim against a number of cigarette manufacturers. *See id.* at 302. While the plaintiff in that case never smoked cigarettes manufactured by three of the named defendants, the Appellate Division allowed claims of fraud, fraudulent concealment, and negligent misrepresentation to survive against the non-manufacturing defendants' motion for summary judgment. *See id.* at 303. However, the *Standish* case is distinguishable from the instant case. The plaintiff in *Standish* brought suit against a group of cigarette manufacturers. She alleged that the defendants acted in concert with one another to commit a tortious act. In particular, the *Standish* plaintiff alleged that the defendants, as part of the cigarette industry, made false representations to the public about the addictive nature of cigarettes. *See id.* Here, Goldych seeks to hold one pharmaceutical company liable for an allegedly defective product manufactured by another company. Goldych does not claim that Teva Pharmaceuticals and Eli Lilly joined in an agreement or common scheme to make false representations to the public about the drug Prozac and its bioequivalents. The court is unpersuaded by this argument because *Standish* does not open the door for plaintiffs to hold one manufacturer liable for injuries stemming from another manufacturer's product.

Additionally, a New York plaintiff, such as Goldych, seeking recovery for negligence or negligent misrepresentation must demonstrate that the defendant owed her a duty of care. *See* Fagan, 356 F.Supp.2d at 206. Since Eli Lilly has no duty to the users of other manufacturers' products, Goldych's claims for negligence, fraud, fraudulent concealment, and negligent misrepresentation cannot be maintained on the facts of this case.

The court adopts the rationale articulated in *Foster* and *Colaccio,* and holds that a brand name manufacturer cannot be held liable to a plaintiff allegedly injured by another company's generic bioequivalent. Accordingly, Goldych's first, second, third, and fourth causes of action are dismissed.

**C. *Violation of General Business Law Sections 349 and 350***

New York General Business Law § § 349 and 350 prohibit "deceptive acts or practices in the conduct of *any* business, trade or commerce or in the furnishing of any service in this state[.] ..." N.Y. GEN. BUS. LAW § 349(a); *see also* *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.,* 828 F.Supp. 1114, 1128-1129 (S.D.N.Y.1993). "These statutes on their face apply to virtually all economic activity, and their application has been correspondingly broad." *Karlin v. IVF Am., Inc., et. al.,* 93 N.Y.2d 282, 290 (1999). "The reach of these statutes provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State." *Id.* at 291 (alteration in original) (quotation marks and citation omitted). When these sections of the New York General Business Law were first enacted in 1970, only the Attorney General was empowered to enforce them. *See id.* In 1980, the statute was amended to allow a private right of action. *See id.* Plaintiffs suing under these sections are entitled to compensatory damages, limited punitive damages and attorney's fees. *See* N.Y. GEN. BUS. LAW § 349(h).

Courts have established the elements of a claim for deceptive practices under § 349, as well as the elements of a claim for deceptive advertising under § 350. The elements for both of these causes of action are (i) that defendants engaged in conduct that was misleading in a material respect; (ii) the deceptive conduct was 'consumer oriented'; and (iii) that the plaintiff was injured *'by reason of'* defendant's conduct. *See* *Ortho Pharmaceutical Corp.,* 828 F.Supp. at 1128-1129. "A material misrepresentation is made when a statement 'is likely to mislead a reasonable consumer acting reasonably under the circumstances.' " *Anunziatta v. Orkin Exterminating Co., Inc.,* 180 F.Supp.2d 353, 361 (N.D.N.Y.2001) (citing *Stutman v. Chemical Bank,* 95 N.Y.2d 24, 30 (2000)). "The test is an objective one .... [w]hether a representation is material and whether it is likely to mislead a reasonable consumer may be determined as a matter of law." *Id.*

*7 "To satisfy the 'by reason of' requirement, plaintiff[ ] need[s] only allege that the defendant['s] material deceptive act[s] caused the injury." *In re: Methyl Tertiary Butyl Ether Prods. Liability Lit.,* 175 F.Supp.2d 593, 631 (S.D.N.Y.2001) (internal quotation marks and citation omitted). A plaintiff need not rely on the alleged deceptive conduct to assert a claim under section 349. *See id.* A plaintiff seeking recovery under these statutes must show a causal connection between the defendant's conduct and the plaintiff's injury. *See id.*

Although "[t]he typical case under section 349 generally involves claims arising directly out of a commercial transaction between a plaintiff consumer and a defendant seller, neither the text of the statute nor the case law establishes this requirement." *Id.* at 630-631. "The phrase 'commercial transaction' can be found nowhere in the plain language of the statute, and section 349(h) specifically empowers 'any person who has been injured by reason of any violation of this section' to bring an action." *Id* . (citing N.Y. GEN. BUS. LAW § 349(h)). "Indeed, there is no requirement of privity, and victims of indirect injuries are permitted to sue under the Act." *Id.* at 631 (internal quotation marks and citation omitted). Consumer oriented conduct refers to "conduct that has a broad impact on consumers at large." *Id.* at 630.

Eli Lilly argues that the purchase of prescription drugs is not an ordinary consumer transaction and, therefore, Goldych's New York Business Law claims must fail. It analogizes to New York cases concluding that New York's deceptive practice laws do not apply in federal securities contexts. *See* *In re Dean Witter Managed Futures Ltd. P'ship Litig.,* 282 A.D.2d 271, 271-272 (1st Dept.2001). It compares prescription drugs to securities, noting that neither entails an ordinary consumer transaction for two reasons. First, it maintains that there are levels of third-party intervention [FN13] for individuals purchasing prescription drugs that are not available to purchasers of ordinary products or services in the consumer marketplace. Secondly, both prescription medications and securities are different than consumer products because they are subject to pervasive federal regulation such as those of the Federal Drug Administration. Goldych maintains that there is an important distinction between federal securities and prescription drugs since "securities are purchased as investments, not as goods to be 'consumed' or 'used.' " *Morris v. Gilbert,* 649 F.Supp. 1491, 1497 (E.D.N.Y.1986).

FN13. Thus, unlike ordinary consumer products, a prescription drug purchaser must

> receive a prescription from his physician who, after examining the patient, determines the best course of treatment. Then, each patient must present a prescription authorized by a licensed physician to a registered pharmacist to obtain prescription products.

Eli Lilly cites no cases to support its argument. However, in *Karlin v. IVF America, Inc., et. al.,* cited by Goldych in opposition, the Court of Appeals held that plaintiffs may pursue their General Business Law § § 349 and 350 claims against providers of medical services or products. *See* *Karlin v. IVF Am., Inc.,* 93 N.Y.2d 282, 291 (N.Y.Ct.App.1999). The Court held that "a blanket exemption for providers of medical services and products is ... contrary to the plain language of the statutes ... [and to the] legislative history, as supporters of the consumer protection bills recognized that consumers of medical services and products might be particularly vulnerable to unscrupulous business practices." [FN14] *Id.* at 291. Finally, in an effort to ease concerns that its holding would result in a tidal wave of consumer protection litigation, *Karlin* explained that such a possibility is "avoided by [the] adoption of an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* at 294.

> FN14. *Karlin* explained, "while the question before us is a novel one, General Business Law § § 349, 350 have long been powerful tools aiding the Attorney General's efforts to combat fraud in the health care and medical services areas. The Attorney General has relied on these provisions to challenge deceptive and fraudulent practices in contexts as diverse as the marketing of AIDS-related products ...; baldness treatments ...; abortion counseling clinics ...; hearing aids ...; and the therapeutic benefits of adjustable beds and chairs." *Karlin,* 93 N.Y.2d at 291.

***8** Here, Goldych's theory is essentially as follows: (1) Eli Lilly materially misrepresented the side effects of Prozac to the public when it failed to provide adequate warnings and/or information about its link to suicidal ideation; (2) the material misrepresentations were consumer oriented because *Karlin* recognized medical services and products as ordinary consumer products; and (3) the decedent was injured by Eli Lilly's material misrepresentations because, ignorant of information regarding Prozac's side effects, he took his psychiatrist's prescription to the pharmacist, generically filled it to save money, ingested the drug, and committed suicide.

While comprehensible, Goldych's theory fails to satisfy the third element of a *prima facie* case. Construing the facts as they most favor her, she has not proven that her husband was injured 'by reason of' Eli Lilly's conduct. She has not shown a causal connection between Eli Lilly's alleged misconduct and her husband's death. The fact that Eli Lilly did not manufacture the ingested drug interrupts the causation element required under sections 349 and 350 of New York's General Business Law. *See* *Stutman,* 95 N.Y.2d at 29. Goldych must assert a tangible harm, not merely a public harm. Because she cannot prove that the decedent was injured 'by reason of' Eli Lilly's conduct, Goldych's allegations are insufficient to support a claim under Sections 349 and 350 of New York General Business Law, and must be dismissed.

Alternatively, and even if the business law claims survived, the court could not retain jurisdiction since the monetary requirement necessary for diversity jurisdiction is destroyed with the dismissal of Goldych's common law claims. New York General Business Law § 349(j) provides:

> In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. GEN. BUS. LAW § 349(j).

The damages available to Goldych under Sections 349 and 350 are limited. Therefore, she cannot satisfy the amount in controversy requirement of 28 U.S.C. § 1332, and the court would remand to state court. [FN15] Accordingly, Eli Lilly's motion to dismiss is granted as to Goldych's fifth cause of action.

> FN15. 28 U.S.C. § 1332(a)(1) provides:
> The district courts shall have original jurisdiction of all civil actions where the

> matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between ... [c]itizens of different states.
>
> 28 U.S.C. § 1332(a)(1).

**D. *Goldych's Derivative Claims***

Eli Lilly argues that Goldych's wrongful death and loss of consortium claims are derivative of her product liability claims, and therefore, they cannot survive. N.Y. E.P.T.L. § 5-4.1(1) (McKinney 2005) reads in relevant part:

> ***9** The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such action must be commenced within two years after the decedent's death....

N.Y. E.P.T.L. § 5-4.1(1).

Because Goldych's claims for wrongful death and loss of consortium are derivative of the other claims asserted in her complaint which the court has now dismissed, the derivative claims are also dismissed.

**WHEREFORE,** for the foregoing reasons, it is hereby

**ORDERED** that Eli Lilly's motion to dismiss is **GRANTED,** and it is further

**ORDERED** that Eli Lilly's motion for summary judgment is **GRANTED,** and it is further

**ORDERED** that all of Goldych's claims are **DISMISSED,** and it is further

**ORDERED** that the Clerk provide a copy of this Decision and Order to the parties.

**IT IS SO ORDERED.**

Not Reported in F.Supp.2d, 2006 WL 2038436 (N.D.N.Y.), 66 Fed.R.Serv.3d 799

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Fred SPAGNOLA, individually, and on behalf of all those similarly situated,
Plaintiff,
v.
THE CHUBB CORPORATION, Federal Insurance Company, Great Northern Insurance Company, John D. Finnegan, and, Thomas F. Motamed, Defendants.
**No. 06 Civ. 9960(HB).**

March 27, 2007.

***OPINION & ORDER***

Hon. HAROLD BAER, JR., District Judge.

***1** Fred Spagnola ("Plaintiff") brings this putative class action for breach of contract against The Chubb Corporation ("Chubb"), Federal Insurance Company ("FIC"), Great Northern Insurance Company ("Great Northern"), John D. Finnegan ("Finnegan"), and Thomas F. Motamed ("Motamed") (collectively, "Defendants").

The Amended Complaint [FN1] alleges five separate causes of action: (1) breach of contract; (2) violation of N.Y. INSURANCE LAW § 3425; (3) violation of N.Y. GENERAL BUSINESS LAW § 349; (4) unjust enrichment; and (5) injunctive relief. Defendants have moved to dismiss Plaintiff's complaint against all Defendants pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons that follow, Defendants' Motion to Dismiss is GRANTED in its entirety.

> FN1. Plaintiff has amended his complaint on at least two occasions since this case was first removed from state court--November 30, 2006 and December 29, 2006.

**I. FACTUAL BACKGROUND**

Plaintiff and his wife purchased an extended replacement cost homeowner's insurance policy ("Policy") [FN2] issued by Defendant Great Northern for a one-year term in 2001. [FN3] Compl. ¶ 11. The Policy states that Great Northern would pay the costs of reconstruction "even if this amount is greater than the amount of coverage shown in [Plaintiff's] policy." Policy at B-1. In light of fluctuating "reconstruction costs," [FN4] the Policy provides that, with the insured's consent, the insurer may change the coverage amount "when appraisals are conducted and when the policy is renewed, to reflect current costs and values." *Id.* Thereafter, for five consecutive years, and with knowledge that the premium was raised in each of those years, Plaintiff paid the sought for premium, and the Policy was renewed.

> FN2. The Masterpiece Policy offers three different types of coverage: (1) an "extended replacement cost" policy where the insurer pays the cost of reconstruction even if that cost exceeds the insured's amount of coverage; (2) a "verified replacement cost" policy where the insurer pays only the reconstruction cost up to the specified amount of coverage; and (3) a "conditional replacement cost" policy where the insurer pays only a portion of the reconstruction costs which cannot exceed the amount of coverage. Policy at B-1 and B-2.

> FN3. During oral argument, Plaintiff noted that he purchased Great Northern's insurance policy through a broker. This information is irrelevant to the disposition of this motion.

> FN4. According to the Policy, the "reconstruction cost" is defined as the "amount required at the time of loss to repair or rebuild the house whichever is less, at the same location, with the same quality of materials and workmanship which existed before the loss." Policy at B-1. Such costs will vary to the extent that improvements have been made on the home (*Id.*) and, logically, as the costs of construction materials fluctuate (*e.g.*, wood, labor, etc.).

Defendant Great Northern is one of several insurance companies within the "Chubb Group" of insurance companies, and the company who issued Spagnola's Masterpiece Policy. Compl. ¶ 11. The Chubb Corporation, the overarching parent of the

Chubb Group and the companies within, is named as a Defendant in this case. *Id.* ¶ 12. Plaintiff alleges that the Chubb Corporation established uniform contract language and practices that were of "material assistance in the perpetration of the wrongs" complained of and that "participation in the creation of contracts and practices with respect to their implementation, make [ ] it a party to the policies between [Plaintiff and Defendant Great Northern]." *Id.* ¶ ¶ 18, 20. Defendant FIC is the largest of the insurance companies within the Chubb Group, and manages the other companies. *Id.* ¶ 13. Plaintiff asserts that there is significant overlap between senior management of the Chubb Corporation, FIC and Great Northern, and that the three share the same principal place of business. *Id.* ¶ ¶ 13, 14.

Plaintiff also names two executives individually--John D. Finnegan, the President, CEO and Director of Chubb, Chairman of the Board and CEO of FIC, and Thomas F. Motamed, Vice Chairman and COO of Chubb, and President of FIC. Plaintiff alleges that each has participated, aided and abetted or conspired in the wrongs alleged in the Complaint. *Id.* ¶ ¶ 21-22.

## II. STANDARD OF REVIEW

*2 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the movant must establish that the plaintiff has failed to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, this Court must construe all factual allegations in the complaint in favor of the non-moving party. *See Krimstock v. Kelly,* 306 F.3d 40, 47-48 (2d Cir.2002). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Shakur v. Selsky,* 391 F.3d 106, 112 (2d Cir.2004) (*quoting McEachin v. McGuinnis,* 357 F.3d 197, 200 (2d Cir.2004)). The court's consideration is normally limited to facts alleged in the complaint, documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken. *Leonard F. v. Israel Discount Bank,* 199 F.3d 99, 107 (2d Cir.1999) (citation omitted). However, "even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir.2002) (citations and internal quotations omitted). [FN5]

FN5. The Court has reviewed the Complaint, all moving papers, opposition, and exhibits, including Policy forms.

## III. DISCUSSION

I address Plaintiff's allegations against Defendant Great Northern first, followed by a discussion of the remaining corporate and individual Defendants.

### *Claims Against Great Northern*

*a. Count I: Breach of Contract*

The Policy explicitly addresses the "Amount of Coverage":

> ***With your consent, we may change this amount*** when appraisals are conducted and ***when the policy is renewed to reflect current costs and values.*** During the policy period, the amount of coverage will be increased daily to reflect the current effect of inflation. At the time of a covered loss, your amount of house coverage will include any increase in the United States Consumer Price Index from the beginning of the policy period ...

Policy at B-1 (emphasis added). With respect to "consent" and "renewal," the insurer (or its agent):

> ... may offer to renew this policy at the premiums and under the policy provisions in effect at the date of renewal. We can do this by mailing you a ***bill for the premium ... along with any changes in the policy provisions or the amounts of coverage.*** If you do not accept our offer, the policy will automatically terminate at the end of the current policy period. ***Failure to pay the required renewal premium when due shall mean that you have not accepted our offer.***

*Id.* at Y-1 (emphasis added).

Plaintiff claims that Great Northern breached the terms of the Policy by improperly increasing coverage (and premiums) (1) without the consent of the insured, (2) in excess of the Consumer Price Index ("CPI"), and (3) in violation of the Policy's stated adherence to New York Insurance Law § 3425. [FN6] Compl. ¶ ¶ 103-13. In the alternative, Plaintiff states that the Policy is a contract of adhesion and, therefore, to the extent its terms are "ambiguous," New York law requires construction in Plaintiff's favor. *Id.* at ¶ ¶ 114-15; Pl's Opp. to Defs' Mot. to Dismiss at 10-11. Defendants, in turn, argue that Plaintiff's claim fails for at least three reasons: (1) the alleged contractual terms on which he sues do not exist; (2) his current objection to past premiums are barred by his repeated, voluntary payment of them and (3) the filed rate doctrine bars recovery. Defs' Mem. in Support of Mot. to Dismiss at 8-9.

FN6. The Court will address this assertion in the following section.

***3** Plaintiff's first contention, that Defendant breached the terms of the insurance Policy is unsustainable because the contract terms upon which he sued do not exist and the Policy terms which do address his claims are not ambiguous. This Court declines to "read an ambiguity into [the Policy] because one of the parties [has] become[ ] dissatisfied with its position under the plain terms of the agreement." *Yucyco, Ltd. v. Republic of Slovenia,* 984 F.Supp. 209, 222 (S.D.N.Y.1997) (citation omitted). "Clear and unambiguous terms should be understood in their plain, ordinary, popular and nontechnical sense." *National Union Fire Ins. Co. v. Cohen,* No. 92-CV-9500 (LMM), 1994 U.S. Dist. LEXIS 18456, *13 (S.D .N.Y. Dec. 23, 1994) (citation omitted). The Policy explicitly notifies the insured that (1) Great Northern may increase coverage and premiums annually (Policy at B-1), (2) the amount of such increases will "reflect current costs and values," (*Id.*) (defined as the "reconstruction costs" on the same page, not the CPI (*Id.*)), (3) Great Northern will provide an annual bill for the premium with any changes in policy provisions or coverage (*Id.* at Y-1), (4) payment of the annual premium reflects the insured's consent (*Id.*), and (5) the CPI applies to interim period adjustments (*Id.* at B-1).

Further, Plaintiff's breach of contract claim is barred by the voluntary payment doctrine which "bars recovery of payments voluntarily made 'with full knowledge of the facts.' " *Newman v. RCN Telecom Servs., Inc.,* 238 F.R.D. 57, 79 (S.D.N.Y.2006) (noting that the doctrine would bar recovery by internet subscribers who, alleging slower than advertised service, continued to pay for and use the (citations omitted); *Gimbel Bros. v. Brook Shopping Ctrs., Inc.,* 499 N.Y.S.2d 435, 439 (N.Y.1986) ("When a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand, and litigate the issue before, rather than after, payment is made."). *See also* CJS Payment § 104 (West 2007) ("Except where otherwise provided by statute, a person generally cannot recover money he or she has voluntarily paid, with full knowledge of all the relevant facts, and without any unjust enrichment, fraud, duress, or extortion ... This rule exists to protect persons who have had unsolicited "benefits" thrust upon them, and places upon a party who wishes to challenge the validity or legality of a bill for payment the obligation to challenge the bill either before voluntarily making payment, or at the time of voluntarily making payment."). Defendants correctly point out that Plaintiff had full knowledge of the facts regarding coverage and premium at the time of his first renewal in 2002 and yet continued (without objection) [FN7] to pay increased premium amounts on each of the five succeeding anniversary dates. Plaintiff could have elected, at any time, not to pay the premium and, thereby terminate coverage with Great Northern, and could have searched for a new provider within a well-developed insurance market. It is a little late now, after he has enjoyed the benefits and protections of Great Northern's coverage for more than five years, to come by and successfully challenge the propriety of such coverage. Plaintiff's claim for breach of contract must be dismissed. I need not address Defendants' argument in support of dismissal on the basis of the filed rate doctrine.

FN7. The Complaint does not allege, nor did Plaintiff's counsel offer at oral argument any facts to indicate that Plaintiff made any affirmative objection(s) to the Policy before filing this suit.

*b. Count II: Violation of N.Y. Insurance Law § 3425*

***4** Plaintiff argues that Great Northern violated N.Y. INSURANCE LAW § § 3425(d)(1) and (e) because, in his view, pursuant to those sections, the Defendant (1) could not condition the renewal of the policy on the insured's acceptance of the increased premiums for the first three years of the Policy (§ 3425(e)) and (2) thereafter, was required to issue a written notice explaining the reasons for the conditional renewal (§ 3425(d)(1)). Defendants argue that § § 3425(d)(1) and (e) are inapplicable to Plaintiff's extended replacement policy.

N.Y. Insurance Law § 3425(e) states, in relevant part, with respect to personal lines of insurance (of which homeowner's insurance is one type), that "no notice of nonrenewal or conditional renewal of a covered policy shall be issued to become effective during the required policy period [FN8] unless it is based upon a ground for which the policy could have been cancelled." N.Y. Insurance Law § 3425(d)(1) states, in relevant part, that the "specific reason or reasons for nonrenewal or conditioned renewal shall be stated in or shall accompany the notice." The drafters intended the Section to "regulate insurers' efforts to eliminate policyholders, so as to protect the public from having their policies routinely cancelled for improper reasons, such as filing claims based on legitimate losses." *Iaia v. Graphic Arts Mut. Ins. Co.,* 670 N.Y. S.2d 683, 684 (N.Y.1997).

FN8. N.Y. Insurance Law § 3425(a)(2)(C)(7) defines the "required policy period" for personal lines of insurance as "three years from the date as of which a covered policy is first issued or is voluntarily renewed."

While case law provides little guidance on these two subsections from N.Y. Insurance Law, Defendants direct the Court's attention to two N.Y. Insurance Department opinions. [FN9] Each supports the proposition that Section 3425 is inapplicable to this particular policy. The first answers the question: can an insurer renew a homeowner's policy with a six-month term despite the Section's required period of three years? The Department answered affirmatively writing that "required policy periods ... do not have any effect upon the ability of an insurer to renew policies with a premium change." Op. re: Rate Changes and N.Y. Insurance Law § 3425, Office of the General Counsel, N.Y. State Insurance Dep't, Jul. 23, 2003. Plaintiff's attempt to distinguish the instant case from the facts presented to the Insurance Department fails. While it may not present the *actual* increase in premium, like the policy in the opinion, Plaintiff's Policy explicitly indicates that coverage (and premiums) will increase annually to "reflect current costs and values." Policy at B-1. An extended replacement cost policy is designed to keep pace with inflation and prevent underinsurance, and therefore, *does not, and for the insured's protection, cannot specify* the exact amount of coverage or premium increase at the time of the Policy's renewal. [FN10] Plaintiff points to no authority to the contrary.

FN9. Plaintiff contends such opinions have no precedential value and may not be relied upon by the Court but I see and he cites no authority which would preclude consideration of an "informal" opinion issued by the New York Insurance Department. *Preferred Medical Imaging v. Liberty Mutual Fire Ins. Co.*, 815 N.Y.S.2d 496 (Suffolk Dist.2006) and *In the Matter of Park Radiology, P.C.*, 2 Misc.3d 621, 2003 Slip Op. 23910 (Rich.Co.2003) are distinguishable from the instant case because, as Defendants point out, significant contrary case law existed and was presented to contradict the informal opinion. Plaintiff presents no authority to the contrary. Neither case forwards Plaintiff's sweeping statement that informal opinions carry "no precedential value" and are irrelevant to the decision at bar. Further, Plaintiff contends that this Court should treat Department of Insurance opinions like Securities Exchange Commission ("SEC") "no action" letters. Courts in this Circuit have routinely held that "[w]hile no-action letters lack precedential value, courts routinely consider the SEC's opinion and may or may not chose to rely on them." *Gryl v. Shire Pharms. Group PLC,* No. 00-CV-9173(HB), 2001 U.S. Dist. LEXIS 13371, at *11 n. 9 (S.D.N.Y. Aug. 30, 2001).

FN10. *See* Bruce Mohl, *Being Underinsured Can Really Hit Home,* Boston Globe, Jun. 17, 2001, at GL-CONSUMER-COL (attributing the pervasive problem of underinsurance, in part, to a "failure to properly account for construction-cost inflation," "consumers [who] confuse the insured value of a home with its market value," and praising extended replacement coverage [by name] for meeting a particular need); *Hundreds of Claims Adjusters Pour Into Florida to Assess Charley's Damage,* BESTWIRE, Aug. 19, 2004 (discussing the problem of underinsurance in the wake of hurricane Charley and how it may not be a problem because "most homeowner's insurance has inflationary coverage and once insurers set the price, they automatically increase it every year").

Second, on the issue of notice, the Department has opined that no notice was required "when a change of limit is the result of the application of an inflation guard....because the increase in coverage is required by the terms of the policy [and] the premium increase is tied to an increase in coverage amount." Op. re: Conditional Renewal Notices, Office of the General Counsel, N.Y. State Insurance Dep't, Apr. 8, 2002. Plaintiff's objection misunderstands the underlying purpose of section 3425 and the protection afforded by the extended replacement cost policy. Therefore, Plaintiff's section 3425 claim fails as a matter of law.

*c. Count III: Deceptive Trade Practices under N.Y. Gen. Bus. Law § 349*

***5** N.Y. Gen. Bus. Law § 349(a) states that "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state are hereby declared unlawful." To state a claim under N.Y. Gen. Bus.

Law § 349, a plaintiff must allege (1) the act or practice was consumer-oriented, (2) the act or practice was misleading in a material respect, and (3) the plaintiff was injured as a result. *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir.2002). Plaintiff claims that Great Northern's alleged conduct in raising premiums and coverage "on specious grounds in violation of its duty under law and the form policy is 'misleading in a material way' to consumers." Compl. ¶ 90; Pl's Mem. in Opp. to Defs' Mot. to Dismiss at 23. Not surprisingly, Defendants have a different view and argue that Plaintiff's claim here fails on four grounds: (1) Plaintiff has not adequately alleged the elements of a Section 349 claim; (2) the claim is barred by the voluntary payment doctrine; (3) the claim is barred by the filed rate doctrine; and (4) the claim is barred by the statute of limitations.

Turning to Plaintiff's Section 349 claim and Defendants' contention that this claim is unsustainable, I agree. Plaintiff has failed to allege facts sufficient to support a claim that Great Northern's Policy was "misleading in a material respect," secondly, that he or any other member of the putative class was "injured" as a result of Great Northern's Policy, and, finally, as required by Section 349, that Great Northern's coverage and premium increases reflect a uniform, "consumer-oriented practice." Therefore, this claim must fail. I need not address Defendants' three additional arguments in support of dismissal of Plaintiff's Section 349 claim.

*d. Count IV: Unjust Enrichment*

Defendants argue that Plaintiff's unjust enrichment claim fails because (1) the existence of an express contract bars this quasi-contractual claim and (2) the voluntary payment and filed rate doctrines also bar this claim. Plaintiff does not dispute that a valid contract claim will bar unjust enrichment, but instead, pleads unjust enrichment as an alternative to his contract claim.

Because Plaintiff does not challenge the overall validity of the insurance policy, but rather, particular provisions, his claim for unjust enrichment fails. It is well established that a plaintiff "clearly may not recover under a theory of unjust enrichment" where a "valid and enforceable written [contract] govern[s] the particular subject matter of [the] case." *Beth Israel Medical Ctr. v. Horizon Blue Cross & Blue Shield*, 448 F.3d 573, 587 (2d Cir.2006) (dismissing claim for unjust enrichment). In the presence of an insurance contract, courts in this Circuit have regularly dismissed insured's claims for unjust enrichment. *See, e.g., Id.; Page Mill Asset Mgmt. v. Credit Suisse First Boston, Corp .,* No. 98-CV-6907(MBM), 2000 U.S. Dist. LEXIS 3941, *28-29 (S.D.N.Y. Mar. 29, 2000) ("[B]ecause unjust enrichment is a quasi-contractual remedy, 'the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery ... for events arising out of the same subject matter.' ") (citation omitted); *Goldman v. Metropolitan Life Ins. Co.*, 841 N.E.2d 742, 747 (N.Y.2005) ("Given that the disputed terms and conditions fall entirely within the insurance contract, there is no valid claim for unjust enrichment."). This claim is dismissed.

*e. Count V: Injunctive Relief*

***6** Plaintiff does not assert a claim under Count V. Instead, Pl. "repeats and realleges the prior allegations" and states that "[t]he ongoing misconduct warrants the imposition of injunctive relief." Compl. ¶¶ 133-34. However, an injunction is a ***remedy*** and not a separate cause of action sustainable on its own. *Lekki Capital Corp. v. Automatic Data Processing, Inc.*, No. 01-7421, 2002 U.S. Dist. LEXIS 8538, *11 (S.D.N.Y. May 13, 2002). Count V is dismissed.

***Claims Against The Other Named Defendants***

Because Plaintiff has not shown on the face of the Complaint facts or allegations which would lead to any cognizable recovery under the law against Great Northern, the signatory to the insurance contract, the Court need not reach the question of agency theory or veil piercing for the other corporate and individual defendants. [FN11]

FN11. Plaintiff also alleges that Defendants have each "aided, abetted, and conspired with one another in all of the practices complained of" and that "[t]he purpose of the conspiracy is to secure greater premiums than otherwise would be obtained, and actual concert is demonstrated ... respecting uniform acts, practices, documents, breaches of contract, violations of New York Insurance Law, and deceptive practices." Compl. ¶ 89. However, other than this single reference in the Complaint, Plaintiff alleges no facts to support a violation or stated cause of action for common law fraud, conspiracy or aiding and abetting under New York law or pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq. Consequently, this Court need not explore Plaintiff's musings in this area.

## IV. CONCLUSION

For the foregoing reasons, I hold that Plaintiff has not stated a claim for which relief may be granted, and, therefore, pursuant to Fed.R.Civ.P. 12(b)(6), this case is dismissed in its entirety against all Defendants.

The Clerk of the Court is instructed to close this matter and remove it from my docket.

**IT IS SO ORDERED.**

Not Reported in F.Supp.2d, 2007 WL 927198 (S.D.N.Y.)

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C

United States Court of Appeals,
Sixth Circuit.
Denise WEISBARTH, Plaintiff-Appellant,
v.
GEAUGA PARK DISTRICT, Betty Cope, Robert McCullough, Mark Rzeszotarski, Tom Curtin, Keith McClintock, Richard Sherwood, and David Kessler, Sr., Defendants-Appellees.
**No. 06-4189.**

Argued: July 24, 2007.
Decided and Filed: Aug. 24, 2007.

**Background:** Former employee filed § 1983 suit against county park district, claiming First Amendment retaliation for her termination as park ranger allegedly due to comments that she made to consultant hired by employer to interview employees as part of departmental evaluation. After bench trial, the United States District Court for the Northern District of Ohio, Kathleen McDonald O'Malley, J., dismissed for failure to state claim. Employee appealed.

**Holdings:** The Court of Appeals, Ronald Lee Gilman, Circuit Judge, held that:
(1) employee was not speaking as citizen, as required for First Amendment protection, and
(2) employee tacitly acknowledged that her speech did not touch on matters of public concern.
Affirmed.

**[1] Federal Courts 776**

170Bk776 Most Cited Cases
A district court's dismissal of a complaint for failure to state claim upon which relief can be granted is reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

**[2] Federal Courts 794**
170Bk794 Most Cited Cases
On review of a district court's dismissal of a complaint for failure to state claim, all well-pled allegations of the complaint are taken as true. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

**[3] Federal Civil Procedure 1772**
170Ak1772 Most Cited Cases
To survive a motion to dismiss for failure to state claim, the complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

**[4] Federal Courts 763.1**
170Bk763.1 Most Cited Cases

**[4] Federal Courts 794**
170Bk794 Most Cited Cases
In reviewing district court's dismissal of complaint for failure to state claim, Court of Appeals conducts essentially the same analysis as the district court by taking the plaintiff's factual allegations as true, and if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief, then dismissal is proper. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

**[5] Constitutional Law 1929**
92k1929 Most Cited Cases
In order for a government employee's speech to warrant First Amendment protection, *Connick* and *Pickering* threshold requirements are that the employee (1) must have spoken as a citizen, and (2) must have addressed matters of public concern. U.S.C.A. Const.Amend. 1.

**[6] Constitutional Law 1929**
92k1929 Most Cited Cases
When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. U.S.C.A. Const.Amend. 1.

**[7] Constitutional Law 1929**
92k1929 Most Cited Cases
County park district employee claiming retaliation was not speaking as citizen, as required for First Amendment protection of her speech about work morale and performance issues to consultant hired by park district to evaluate ranger department and to interview its employees, where employee's speech occurred as part of carrying out her official duties although not appearing in her written job description, speech took place pursuant to consultant's official duty to interview employee about job-related issues even though he was not within employer's chain of command, and speech concerned very matters that

her employer requested consultant to address. U.S.C.A. Const.Amend. 1.

**[7] Counties 67**
104k67 Most Cited Cases
County park district employee claiming retaliation was not speaking as citizen, as required for First Amendment protection of her speech about work morale and performance issues to consultant hired by park district to evaluate ranger department and to interview its employees, where employee's speech occurred as part of carrying out her official duties although not appearing in her written job description, speech took place pursuant to consultant's official duty to interview employee about job-related issues even though he was not within employer's chain of command, and speech concerned very matters that her employer requested consultant to address. U.S.C.A. Const.Amend. 1.

**[8] Constitutional Law 1929**
92k1929 Most Cited Cases
County park district employee tacitly acknowledged that her speech to consultant hired by park district to interview employees pursuant to departmental evaluation did not touch on matters of public concern, as required for First Amendment protection of her speech from retaliation, where employee expressly confined her allegations on her retaliation complaint to speech regarding internal departmental morale and performance on only day-to-day matters directly related to her job as park ranger. U.S.C.A. Const.Amend. 1.

**[8] Counties 67**
104k67 Most Cited Cases
County park district employee tacitly acknowledged that her speech to consultant hired by park district to interview employees pursuant to departmental evaluation did not touch on matters of public concern, as required for First Amendment protection of her speech from retaliation, where employee expressly confined her allegations on her retaliation complaint to speech regarding internal departmental morale and performance on only day-to-day matters directly related to her job as park ranger. U.S.C.A. Const.Amend. 1.

**ARGUED:** Joseph M. Hegedus, Ohio Patrolmen's Benevolent Assn., Columbus, Ohio, for Appellant. David S. Kessler, Blaugrund, Herbert & Martin, Dublin, Ohio, for Appellees. **ON BRIEF:** Joseph M. Hegedus, Ohio Patrolmen's Benevolent Assn., Columbus, Ohio, Kevin P. Powers, Ohio Patrolmen's Benevolent Assn., North Royalton, Ohio, for Appellant. David S. Kessler, Blaugrund, Herbert & Martin, Dublin, Ohio, Stephen P. Postalakis, Blaugrund, Herbert & Martin, Worthington, Ohio, for Appellees.

Before: COLE and GILMAN, Circuit Judges; MARBLEY, District Judge. [FN*]

**OPINION**

RONALD LEE GILMAN, Circuit Judge.

*1 Denise Weisbarth, a park ranger for the Geauga Park District (GPD) in Geauga County, Ohio, was fired from her job in September of 2004. Following her termination, Weisbarth filed a First Amendment retaliation action pursuant to 42 U.S.C. § 1983, asserting that the GPD fired her due to comments she had made to a consultant hired by the GPD to interview employees as part of a departmental evaluation. The district court dismissed her complaint for failure to state a claim that she had engaged in speech protected by the First Amendment. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

### A. Factual background

Weisbarth began her employment with the GPD as a part-time park ranger in 1997. She became a full-time park ranger in 2003. Under Ohio law, park rangers are fully commissioned police officers. Ohio Rev.Code Ann. § 1545.13(B). During her tenure as a park ranger, Weisbarth led an initiative to institute a canine-handling team and subsequently became the department's official canine handler.

Weisbarth alleges that the Ranger Department as a whole began suffering "serious morale and performance problems" in 2003. Management responded to these problems in October of 2003 by hiring Richard Sherwood, a paid consultant, to evaluate the department. As part of Sherwood's evaluation, he rode along with Weisbarth in her patrol vehicle during one of her shifts. Weisbarth's First Amendment claim is based exclusively on the conversation that took place during this ride-along.

The first topic that Weisbarth discussed with Sherwood was a disciplinary "letter of counseling" that Weisbarth had recently received. Weisbarth told Sherwood that she intended to write her own rebuttal letter for placement in her personnel file. Sherwood allegedly told Weisbarth that he thought this proposed course of action would be unwise and contrary to "team efforts."

The second topic discussed by Weisbarth and Sherwood concerned "morale and performance problems within the Ranger Department." Weisbarth claims that, when she answered Sherwood's questions about these topics honestly, Sherwood "reported her comments to Geauga Park District as expressing a personal dislike for nearly all of her co-workers." At oral argument before the district court regarding the GPD's motion to dismiss, Weisbarth's counsel clarified that this ride-along conversation was the sole basis for Weisbarth's First Amendment claim, and that Sherwood had, as part of his departmental evaluation, spoken with all department employees individually.

The remainder of Weisbarth's complaint sets forth her subsequent interactions with the GPD management that led up to her termination. She contends that, as a result of her ride-along discussions with Sherwood, he labeled her a "source of 'friction' " and developed a "strategy" for getting her fired. This strategy was allegedly put into action when Weisbarth experienced a family crisis and left town without notifying her supervisors. Upon her return, a "heated" meeting took place at which Weisbarth was questioned about her failure to provide notification prior to her absence. According to the complaint, "Weisbarth became emotional and allegedly slammed open a couple of doors as she left the meeting."

***2** The GPD ordered psychological testing for Weisbarth in the aftermath of this meeting, and the examining psychologist found her to be unfit for duty. Weisbarth, however, obtained a second psychological evaluation through the employees' union, and that psychologist reached the opposite conclusion. In response, the GPD ordered Weisbarth to see a tie-breaking third psychologist. The third psychologist agreed with the first psychologist's assessment and found Weisbarth unfit for duty. Weisbarth was fired in September of 2004, shortly after this third evaluation. She claims that the two psychologists who found her unfit for duty conspired with the GPD, and that the real motive for her termination was her allegedly protected speech to Sherwood during the ride-along.

Weisbarth filed a grievance through her union, and the arbitrator ultimately agreed with her position. Although the arbitrator concluded that Weisbarth "should be reinstated," he also suggested that, in light of their differences, the parties "may wish to sit down and work out a separation arrangement." The record does not disclose Weisbarth's current employment status.

**B. Procedural background**

Weisbarth filed this § 1983 action in the United States District Court for the Northern District of Ohio in December of 2005. The defendants thereafter filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging that Weisbarth had failed to state a claim that she engaged in speech protected under the First Amendment. Included in the GPD's motion to dismiss were transcripts of the testimony offered at Weisbarth's earlier arbitration hearing. Our review of that material, however, reveals that it does not further elucidate the central issue in this case regarding Weisbarth's ride-along discussion with Sherwood. The transcripts instead illustrate numerous occurrences both before and after the ride-along that caused the deterioration of Weisbarth's relationship with the GPD, such as her alleged role in a dog-bite incident and in the improper disposal of a racoon--events about which Weisbarth ultimately took (and passed) a polygraph examination. In her brief, Weisbarth also highlights testimony from the arbitration hearing indicating that she had been elected as the representative of the Ranger Department's employee union, but that fact appears to be otherwise unrelated to her claim.

The district court held a hearing to address the various defendants' motions to dismiss in August of 2006. After hearing arguments from the parties, the court issued a detailed ruling from the bench, dismissing Weisbarth's complaint. The court subsequently filed a written dismissal order that simply incorporated its earlier oral ruling. Weisbarth timely filed the present appeal from the district court's dismissal order.

## II. ANALYSIS

**A. Standard of review**

[1][2][3][4] A district court's dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997). All well-pled allegations of the complaint are taken as true. *Id.* "A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." *Id.* This court conducts essentially the same analysis as the district court in

that "we take the plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim[ ] that would entitle [her] to relief, then ... dismissal is proper." Id. (quotation marks omitted) (ellipses in original).

***3** Recently, however, the Supreme Court revised the "no set of facts" portion of the Rule 12(b)(6) standard in *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). *Twombly* held that the "famous" no-set-of-facts formulation "has earned its retirement," and instead dismissed the plaintiff's antitrust-conspiracy complaint because it did not contain facts sufficient to "state a claim to relief that is *plausible* on its face." *Id.* at 1974 (emphasis added). Significant "uncertainty as to the intended scope of the Court's decision [in *Twombly* ]" persists, however, particularly regarding its reach beyond the antitrust context. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007) (applying the plausibility standard in the context of a motion to dismiss Iqbal's § 1983 claims based on qualified immunity).

The Second Circuit in *Iqbal* closely analyzed the text of *Twombly* and determined that it

> is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.

*Id.* (emphasis in original). *Iqbal* thus held that *Twombly*'s plausibility standard did not significantly alter notice pleading or impose heightened pleading requirements for all federal claims. Instead, *Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief. *See Iqbal*, 490 F.3d at 169-70 (determining that Iqbal's excessive-force claim--premised on supervisor liability--did not require Iqbal to plead "subsidiary facts" concerning the warden's knowledge because "it [was] at least plausible that a warden would know of mistreatment inflicted by those under his command"); *see also Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 WL 1989828, at *3 n. 1 (S.D.Ohio July 9, 2007) (noting that eight federal district courts in the Sixth Circuit have thus far applied *Twombly* in the manner described in *Iqbal*, while only one has restricted *Twombly* to the antitrust-conspiracy context).

Ultimately, as explained below, our disposition of Weisbarth's claim does not depend upon the nuances of *Twombly*'s effect on the dismissal standard. We therefore need not resolve the scope of that decision here.

**B. First Amendment protection**

Taking all of the factual allegations in Weisbarth's complaint as true, the essence of her claim is that: (1) the GPD hired a consultant to evaluate the department, (2) the consultant asked department employees, including Weisbarth, about "morale and performance" issues, and (3) when Weisbarth gave honest answers that either the consultant or the GPD did not like, she was fired. An arbitrator ultimately agreed with Weisbarth that her termination was unjust. Weisbarth's appeal, however, does not require us to pass judgment upon the wisdom or propriety of her termination. Instead, it requires a determination only of whether Weisbarth has stated a claim that she was terminated for engaging in speech protected by the First Amendment.

***4** [5][6] In order for a government employee's speech to warrant First Amendment protection, the Supreme Court's *Connick* and *Pickering* decisions have long imposed the threshold requirements that the employee (1) must have spoken "as a citizen," and (2) must have "address[ed] matters of public concern." *See, e.g., McMurphy v. City of Flushing*, 802 F.2d 191, 197 (6th Cir.1986) (holding that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). The Supreme Court clarified the first of these requirements in *Garcetti v. Ceballos*, --- U.S. ----, 126 S.Ct. 1951, 1958, 164 L.Ed.2d 689 (2006), by holding that "when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes." (Emphasis added.)

Following briefing and argument from the parties below, the district court determined that *Garcetti* did not preclude Weisbarth's claim. Although the court did not specifically articulate the ground on which it distinguished *Garcetti*, it apparently concluded that Weisbarth's talk with Sherwood was not explicitly part of her official job description as a park ranger. The court expressed concern that "expanding"

Garcetti to preclude First Amendment protection in this case would permit employers to hire consultants to "solicit statements from employees that then could be used against the employee." Instead, the court determined that, irrespective of whether Weisbarth's alleged speech occurred pursuant to her official duties, the speech simply did not address a matter of public concern. That alternative ground formed the basis for the district court's dismissal. We will address both of these possible grounds in turn.

***1. Weisbarth did not speak "as a citizen"***

[7] Weisbarth's complaint emphasizes (apparently believing that it strengthens her case) the fact that Sherwood was hired by the GPD specifically to evaluate the Ranger Department and to interview its employees. The ride-along conversation between Weisbarth and Sherwood thus took place in the context of Sherwood's official duty to interview Weisbarth regarding the very subjects about which they primarily spoke: morale and performance issues. (Because Weisbarth makes no argument regarding the first topic of conversation alleged in her complaint--the "letter of counseling" that she had received--and because that topic presents a very weak claim for First Amendment protection, we will not address it further.) We therefore accept as a fact for the purpose of Rule 12(b)(6) that the GPD desired Sherwood to ask and Weisbarth to answer the job-related questions that Sherwood posed so that he could complete his departmental evaluation.

***5** The Supreme Court's holding in Garcetti leads us to the conclusion that such speech is not protected under the First Amendment. In that case, plaintiff Ceballos had been employed as a calendar deputy for the Los Angeles County District Attorney's Office. 126 S.Ct. at 1955. A defense attorney at one point asked Ceballos to look into possible inaccuracies in an affidavit that had been used to obtain a search warrant in one of the cases that the District Attorney's Office was actively prosecuting. Id. Pursuant to his duties as calendar deputy, Ceballos investigated and wrote a memo to his supervisor that expressed concerns over the affidavit. Id. The District Attorney's Office nevertheless decided to continue prosecuting the case, and Ceballos was ultimately called by the defendant to testify about his concerns over the warrant. Id. Following the incident, Ceballos was fired by the District Attorney's Office. Id. at 1956. In response, he brought a First Amendment retaliation claim, asserting that he was unconstitutionally terminated due to the speech contained in his written memo. Id.

The Supreme Court held that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." Id. at 1959-60. Furthermore, the Court explained that

> the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case ... distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
>
> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.... The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Id. at 1960.

We next consider three possible grounds that could conceivably distinguish Garcetti from the present case. First, Weisbarth argues that speaking with Sherwood was not actually part of her "official duties" as a park ranger. Weisbarth's obligation to aid Sherwood in his evaluation might instead be more accurately termed an "ad-hoc" duty that arose in the course of Weisbarth's employment. Because the parties in Garcetti did not dispute that Garcetti's speech was made pursuant to his official duties, the Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties." Id. at 1961. Nevertheless, the Court acknowledged the difficulty of pinning down static job descriptions and explained that

> ***6** [f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 1962. Garcetti thus implicitly recognized that such ad hoc or de facto duties can fall within the scope of an employee's official responsibilities despite not appearing in any written job description.

Moreover, Weisbarth's speech indisputably "owes its existence to [her] professional responsibilities," as did Garcetti's. *See* id. at 1960.

This court's recent decision in *Haynes v. City of Circleville,* 474 F.3d 357 (6th Cir.2007), also strongly undercuts any significance that might otherwise attach to this distinguishing factor. Haynes, like Weisbarth, was a canine trainer for a local police force in Ohio. When police administrators decided to institute cost-cutting measures that reduced dog-training hours, Haynes became upset and wrote a memo expressing his concern that the reduced training would render the police dogs less effective and would potentially endanger the public. Haynes was ultimately fired as a result of the memo and other various protests that he had lodged against management.

This court held that Haynes's complaints about the reduction in dog training, although obviously not part of his official written job description, occurred as part of "carrying out his professional responsibilities" of training dogs, and therefore were made "pursuant to his official duties." *Id.* at 364. Weisbarth's discussion with Sherwood--a consultant hired by Weisbarth's employer to interview her about the Ranger Department in order to create a departmental evaluation--actually presents a stronger claim for fitting within her official duties than did Haynes's written complaint. *Haynes,* therefore, counsels that the degree to which Weisbarth's speech corresponded with her official job description does not adequately differentiate her case from *Garcetti.*

A second possible distinction relates to the fact that Weisbarth, unlike Ceballos or Haynes, was specifically asked by her employer, through Sherwood, to comment about the very matters that her speech addressed. This distinction, however, does not lead to a different result. For one thing, although Ceballos may not have been specifically asked by his employer to prepare the memo at issue in that case, he was under a general obligation to occasionally write memos to his supervisors regarding pending cases. *Garcetti,* 126 S.Ct. at 1960. Moreover, this distinction simply serves, if anything, to render Weisbarth's actions more closely linked to her official duties. The fact that Weisbarth was allegedly fired for voicing her concerns over departmental morale and performance issues when explicitly asked to do so by an agent of the GPD thus tends to make its action more constitutionally defensible in this instance, albeit also more difficult to understand. Indeed, a contrary determination--that Sherwood's specific questioning somehow rendered Weisbarth's response outside of her official duties--would be logically insupportable.

*7 A third and final possible distinction is that Weisbarth's speech arose in the context of addressing inquiries of a third-party consultant hired by her employer, whereas *Garcetti* and *Haynes* both involved speech made directly to the employee's supervisor. The reasoning of *Garcetti* and *Haynes,* however, makes clear that the determinative factor in those cases was not where the person to whom the employee communicated fit within the employer's chain of command, but rather whether the employee communicated pursuant to his or her official duties. *See, e.g., Garcetti,* 126 S.Ct. at 1961 (stating broadly that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities").

In sum, none of the proposed distinctions between Weisbarth's case and *Garcetti* justifies departing from the result reached in that case, and this court's opinion in *Haynes* simply reinforces that conclusion. The district court, however, raised an additional policy concern about dismissing Weisbarth's claim based on *Garcetti.* Such a holding, the court feared, would permit government employers to solicit statements from employees on any range of personal or political issues--ostensibly pursuant to their official duties-- and then use those statements against them.

Concern over this unsettling possibility, however, strikes us as unfounded because the pursuant-to-official-duty inquiry ultimately cannot be completely divorced from the content of the speech. As explained in Part II.B.2. below, *Garcetti* stands for the proposition that even employee speech addressing a matter of public concern is not protected if made pursuant to the employee's official duties. But the analysis in both *Garcetti* and *Haynes* suggests that the content of an employee's speech--though not determinative--will inform the threshold inquiry of whether the speech was, in fact, made pursuant to the employee's official duties. *See Garcetti,* 126 S.Ct. at 1960 (noting that "Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor *about how best to proceed with a pending case* " (emphasis added)); *id.* at 1961 (citing *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), for the proposition that "discussing politics with a coworker" would not generally qualify as speech made pursuant to employment responsibilities); Haynes, 474 F.3d at 357 (examining both the context and content of Haynes's memo before concluding that it was written pursuant to his official duties).

In this case, the GPD hired Sherwood for legitimate departmental business, and the topics about which he questioned Weisbarth--employee morale and performance--obviously concerned her day-to-day official duties. Although firing Weisbarth based on her assessment of department morale and performance may seem highly illogical or unfair, the relevant question is whether the firing violated her free-speech rights under the First Amendment. Garcetti informs us that it did not. Implicitly acknowledging the potential inequity that its holding might countenance, the Court in Garcetti explained that

> ***8** [t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments--such as whistle-blower protection laws and labor codes--available to those who seek to expose wrongdoing. Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

126 S.Ct. at 1962 (citations and quotation marks omitted). Thus, although taking action against a public employee for speech made pursuant to official duties might give rise to antidiscrimination, whistleblower, or labor-contract claims, it does not violate the First Amendment.

Weisbarth's reliance on *Marohnic v. Walker*, 800 F.2d 613 (6th Cir.1986), in which this court reversed a grant of summary judgment in favor of the employer regarding a First Amendment retaliation claim, is misplaced. The court in that case found the employee's speech to be protected where he spoke to police officers regarding a criminal investigation of his public employer, a state mental-health board. In fact, the court emphasized that "Marohnic's speech was induced by civic commitment" to cooperate with law enforcement, rather than by any official duty related to his employment. *Id.* at 616. *Marohnic* thus differs materially from the present scenario where Weisbarth spoke solely about departmental morale and performance issues to an agent of the GPD at the GPD's behest.

Weisbarth's reliance on *Jackson v. City of Columbus*, 194 F.3d 737, 746-47 (6th Cir.1999), *abrogated in part on other grounds by* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), is similarly inapposite. The court in that case reversed the district court's dismissal of a First Amendment claim by the Columbus, Ohio Chief of Police regarding a gag order that the city had placed on him pending an investigation of possible wrongdoing on his part. Jackson's speech to the press about the investigation, set against his employer's efforts to silence him, was not made pursuant to his official duties.

Weisbarth finally asserts that we should be hesitant to dispose of her First Amendment retaliation case based solely on the pleadings. But that consideration has little application to the present inquiry of whether Weisbarth spoke pursuant to her official duties. The facts required to reach this conclusion--such as Weisbarth's employment duties, the impetus for her speech, the setting of her speech, the speech's audience, and its general subject matter--are all set forth in the pleadings. Weisbarth's complaint thus makes clear that she spoke pursuant to her official duties rather than "as a citizen," and her claim was therefore properly dismissed.

***2. Matters of public concern***

***9** Our determination that Weisbarth spoke pursuant to her employment responsibilities alleviates the need to address the district court's conclusion that Weisbarth's speech did not touch on matters of public concern. The Supreme Court explained in *Garcetti* that when public employees speak pursuant to their official duties rather than as citizens, "the Constitution does not insulate their communications from employer discipline." Garcetti, 126 S.Ct. at 1960. Indeed, Garcetti's claim was based upon a memo in which he alleged that the government had executed a search warrant based upon an affidavit that contained "serious misrepresentations." *Id.* at 1955. Despite the Court's acknowledgment that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," it nevertheless rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties." *Id.* at 1962; *see also* *Mills v. City of Evansville*, 452 F.3d 646, 647-48 (7th Cir.2006) ("*Garcetti* ... holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job. Only when government penalizes speech that a plaintiff utters 'as a citizen' must the court consider the [*Connick/Pickering* analysis].").

[8] We therefore simply note that our decision to affirm the dismissal of Weisbarth's complaint is made even easier in this case by her failure to allege that any of the speech that she engaged in touched on a matter of public concern. By expressly confining her allegations to speech regarding internal departmental "morale and performance," Weisbarth tacitly acknowledges that her speech addressed only day-to-day matters directly related to her job as a park ranger. *See* *Connick v. Myers,* 461 U.S. 138, 141, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (holding that questions regarding "office transfer policy, *office morale,* the need for a grievance committee, [and] the level of confidence in supervisors," in a questionnaire distributed by an employee were not matters of public concern (emphasis added)). In any event, we find no need to definitively resolve this public-concern prong of the *Connick* analysis in light of our earlier conclusion that Weisbarth spoke pursuant to her official duties.

## III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

FN* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

--- F.3d ----, 2007 WL 2403659 (6th Cir.(Ohio)), 26 IER Cases 979

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Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.
@WIRELESS ENTERPRISES, INC., Plaintiff
v.
AI CONSULTING, LLC and ANDREW IORIO,
Defendants.
AI Consulting, LLC and Andrew Iorio, Defendants-
Third-Party Plaintiffs
v.
Craig J. Jerabeck, 5LINX, and Cellco Partnership,
Third-Party Defendants.
**No. 05-CV-6176 CJS(P).**

Oct. 30, 2006.

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DECISION AND ORDER

CHARLES J. SIRAGUSA, District Judge.

INTRODUCTION

*1 This is an action for breach of contract and related state-law torts, over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Now before the Court are motions [# 19][# 23] to dismiss the third-party complaint by third-party defendants Cellco Partnership, doing business as Verizon Wireless ("Verizon"), and 5Linx ("5Linx"), respectively. For the reasons that follow, Verizon's motion is granted, 5Linx's motion is granted in part and denied in part, and AI is given limited leave to re-plead as set forth below.

BACKGROUND

Unless otherwise noted, the following facts are taken from the Third Party Complaint ("TPC") in this action, and the underlying agency agreement between plaintiff @Wireless Enterprises, Inc. ("@Wireless") and Verizon. [FN1] At all relevant times, Verizon was a wireless communications service provider, which sold cellular radio service and equipment through its own retail stores, as well as through agents. @Wireless sold cellular communications services. In August 2000, Verizon and @Wireless entered into an "Authorized Agency Agreement," in which Verizon appointed @Wireless as a "non-exclusive sales agent" for Verizon's cellular radio service. The agreement provided that @Wireless could delegate its obligations under the contract to "a subcontractor or sub-agent," by written contract, subject to the express written approval of Verizon. The agreement further stated: "Personnel employed by, or acting under the authority of, Agent shall not be or be deemed to be employees or agents of Verizon Wireless, and Agent assumes full responsibility for their acts and shall have sole responsibility for their supervision and control." (Agency Agreement § 2)

FN1. Generally on a motion to dismiss pursuant to Rule 12(b)(6), the Court must consider only the complaint, which is deemed to include "any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002) (citations and internal quotations omitted). Moreover, "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Id.* at 153.

As part of the agreement, @Wireless agreed to certain restrictions on its ability to sell Verizon's products and the products of Verizon's competitors. For example, @Wireless agreed that it would sell Verizon's products only within specified geographic areas. The agreement further stated that the parties could terminate the agreement under certain conditions. For example, the agreement stated that Verizon could "immediately terminate" the agreement upon written notice to @Wireless, if @Wireless breached the agreement. (*Id.* § 9.1.1) As to that, the agreement also stated that, "[u]pon termination of this Agreement for any reason, all rights and privileges granted to Agent hereunder shall immediately terminate." (*Id.* § 7.9.2)

Exercising its right to hire sub-agents, @Wireless entered into a franchise agreement with third-party plaintiff AI Consulting ("AI") in March 2002, in exchange for a $145,000 franchise fee payment from AI to @Wireless. Subsequently, AI operated a retail outlet as an @Wireless franchisee in Southington, Connecticut. During the course of the business relationship between AI and @Wireless, AI dealt directly with third-party defendant Craig Jerabeck ("Jerabeck"), who was at all relevant times President of @Wireless. According to AI, Jerabeck told AI that he would "protect the interests of AI." (TPC ¶ 14)

***2** Unbeknownst to AI, between 2002 and 2004, @Wireless repeatedly breached the agreement with Verizon by, for example, selling products and services of Verizon's competitors. Although Verizon gave @Wireless numerous opportunities to cure the breaches, @Wireless continued to breach the agreement. AI contends that third-party defendant 5Linx, of which Jerabeck was the President and sole shareholder, and which was "affiliated" with @Wireless, also made unauthorized sales of Verizon's products on its website during this period. Verizon complained to Jerabeck about the actions of both @Wireless and 5Linx, and, according to AI, Jerabeck indicated that @Wireless and 5Linx would cease making unauthorized sales. AI contends, however, that Jerabeck lied, and that both @Wireless and 5Linx continued as before. Jerabeck did not inform AI of these unauthorized sales by @Wireless and 5Linx, or of the resulting problems with Verizon. For example, Jerabeck did not inform AI that, in July 2004, Verizon had notified @Wireless that it was in breach of the agreement and that Verizon had decided to terminate the agreement. Instead, on or about September 10, 2004, Jerabeck sent an email to AI, informing it only that @Wireless was in the process of negotiating a new contract with Verizon, which would not affect AI's "day to day operations."

Verizon stopped providing service to @Wireless and @Wireless's franchisees, including AI, on or about September 16, 2004. Verizon also simultaneously commenced an action against @Wireless in the United States District Court for the District of New Jersey. @Wireless then sued Verizon in New York State Supreme Court, Monroe County, on or about September 21, 2004. @Wireless and Verizon subsequently settled the lawsuits and terminated their agreement. As a result, @Wireless and its franchisees, including AI, could no longer lawfully sell Verizon products. A short time later, Verizon opened a competing retail store "almost immediately adjacent" to AI's business. AI then commenced an action against Verizon, @Wireless, 5Linx, and Jerabeck in the United States District Court for the District of Connecticut. However, AI later voluntarily discontinued the action.

Subsequently, @Wireless commenced the subject proceeding against AI, seeking monies allegedly owed pursuant to the parties' franchise agreement. AI then commenced the subject third-party action against Jerabeck, 5Linx, and Verizon. In the TPC, AI purports to state 23 separate causes of action. AI alleges eight causes of action against Jerabeck, for: 1) constructive fraud; 2) actual fraud; 3) constructive trust; 4) breach of contract; 5) breach of implied covenant of good faith and fair dealing; 6) interference with contractual relationship; 7) violation of New York State General Business Law ("GBL") § § 349-350; and 8) negligent misrepresentation. As to these claims, AI alleges that, at all relevant times, Jerabeck was the "President, Chief Executive Officer (CEO), owner and alter egos of @Wireless and 5Linx" (TPC ¶ 9), and that he intentionally and/or negligently made various false statements which induced AI to enter into and remain in the franchise agreement with @Wireless, caused @Wireless to breach the agreement with Verizon, and ultimately led to the demise of AI's business.

***3** AI alleges the same eight causes of action separately against 5Linx, and in that regard, contends that 5Linx, @Wireless, and Jerabeck are alter egos, and that 5Linx ratified and approved Jerabeck's actions. Finally, AI asserts all but the negligent misrepresentation claim separately against Verizon. As for the claims against Verizon, AI contends, on one hand, that Verizon's decision to terminate the agreement with @Wireless had "nothing to do" with AI. Nonetheless, AI seeks to hold Verizon liable for its business losses, since the termination of that agreement "killed off" AI's business. AI further suggests that there was some dishonesty by Verizon involving the settlement of @Wireless's lawsuit in Supreme Court, Monroe County, because certain papers are allegedly missing from that court's file, and because Verizon and @Wireless allegedly "hid" the settlement from AI. Finally, AI alleges that it was somehow improper for Verizon to open a competing shop near AI's store, after Verizon had terminated the agency agreement with @Wireless.

Verizon and 5Linx subsequently filed the subject motions to dismiss the third-party complaint, pursuant to Rule 12(b)(6) of the Federal Rules of

Civil Procedure. Jerabeck did not move against the complaint. 5Linx contends that the contractual claims, including the claim for contractual interference, must be dismissed, because 5Linx had no contract with AI, and because AI's allegations that 5Linx and @Wireless are "alter egos" are conclusory and fail to satisfy Rule 8 of the Federal Rules of Civil Procedure. 5Linx maintains that AI based its "alter ego" claim on the mere fact that Jerabeck was an officer and owner of both companies, and on hearsay statements contained in the complaint filed by Verizon against @Wireless in the aforementioned lawsuit in New Jersey, which was later settled. [FN2] 5Linx states that the fraud and constructive fraud claims also fail, because they are not pled with particularity, and because the TPC does not adequately allege a basis to impute the actions of Jerabeck and/or @Wireless to 5Linx. 5Linx states that the constructive fraud claim similarly is insufficient because AI has not pled the existence of a confidential or fiduciary relationship between AI and 5Linx. 5Linx maintains that the New York General Business Law claims must be dismissed, because the TPC alleges neither false advertising nor any deceptive practice directed toward the public. Finally, 5Linx contends that the negligent misrepresentation claim is insufficient, since, again, AI has not sufficiently pled a basis to hold 5Linx responsible for Jerabeck's alleged misrepresentations.

FN2. Verizon's complaint in the New Jersey matter apparently referred to an agency agreement between @Wireless and 5Linx, in which the latter was described as an "Affiliate" of the former.

As for Verizon's motion, Verizon contends that AI's contractual claims must fail, because there was no contract between them, and because AI had no rights as a third-party beneficiary of the contract between Verizon and @Wireless. Verizon states that the constructive fraud and constructive trust claims must fail because there was no confidential relationship between Verizon and AI, because Verizon made no representations to AI, and because AI transferred no property to Verizon. Verizon alleges that the tortious interference with contract claim must also be dismissed, because AI has not alleged that Verizon did anything improper to interfere with AI's contractual relationships, but rather, it alleges merely that Verizon terminated its contract with @Wireless and opened a competing shop, which Verizon maintains it was entitled to do. Verizon states that the claims pursuant to GBL § § 349 and 350 similarly must fail, since there is no allegation that Verizon engaged in false advertising or other deceptive trade practices, or that such deceptive practices resulted in harm to the public. Finally, Verizon contends that AI's fraud claims should be dismissed pursuant to Rule 9 of the Federal Rules of Civil Procedure, because they fail to state a claim and are not pled with particularity. As to that, Verizon states that the TPC fails to identify any particular fraudulent statement, fails to identify anyone at Verizon who allegedly made fraudulent statements, and fails to allege detrimental reliance by AI.

***4** Counsel for the parties to the third-party action appeared before the undersigned for oral argument of the motions on October 12, 2006. The Court has now thoroughly considered the parties' submissions and the arguments of counsel.

ANALYSIS

*Rule 12(b) (6) Standard*

It is well settled that in determining a motion under Fed.R.Civ.P. 12(b)(6), a district court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Burnette v. Carothers,* 192 F.3d 52, 56 (1999), *cert. denied,* 531 U.S. 1052 (2000). The Court "may dismiss the complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotations omitted) (*citing* Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). However, while the Court must accept as true a plaintiff's factual allegations, "[c]onclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss." *Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1092 (2d Cir.1995)(*citing* *In re American Express Co. Shareholder Litig.,* 39 F.3d 395, 400-01 n. 3 (2d Cir.1994)). Moreover, and significantly, for purposes of the instant case, such "[g]eneral, conclusory allegations need not be credited ... when they are belied by more specific allegations of the complaint." *Id.*

*Choice of Law*

The instant case involves events that occurred in both the State of New York and the State of Connecticut, and centers around an agreement containing a New York choiceof-law provision. The principles concerning a choice-of-law analysis are well settled:

A federal trial court sitting in diversity jurisdiction

> must apply the law of the forum state to determine the choice-of-law. In New York, the forum state in this case, the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws. It is only when it can be said that there is no actual conflict that New York will dispense with a choice of law analysis.

*Fieger v. Pitney Bowes Credit Corp.,* 251 F.3d 386, 393 (2nd Cir.2001) (citations and internal quotations omitted). Accordingly, a court need only perform a choice of law analysis where there is an "actual conflict" between the law of two jurisdictions. *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.,* 414 F.3d 325, 331 (2nd Cir.2005). Such an actual conflict need not be outcome determinative. *Id.* at 331. Instead, an actual conflict exists where "the applicable law from each jurisdiction provides different substantive rules," the differences are " 'relevant' to the issue at hand," and the differences "must have a 'significant possible effect on the outcome of the trial.' " *Id.* at 331 (citations omitted). In the instant case, the parties have cited the law of both the State of New York and the State of Connecticut, though they agree that there is no actual conflict between the law of the two states. Consequently, the Court will cite New York cases in this Decision and Order.

*Contractual Claims*

***5** AI alleges that 5Linx and Verizon are each liable for breach of contract and breach of the warranty of good faith and fair dealing. To establish a claim of breach of contract under New York law, a plaintiff must show "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *Rexnord Holdings, Inc. v. Biderman,* 21 F.3d 522, 525 (2d Cir.1994) (citation omitted). Moreover, "[u]nder New York law, parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract." *Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro,* 961 F.2d 1052, 1056 (2d Cir.1992) (citation and internal quotation marks omitted).

As to the claims against Verizon, AI alleges that Verizon "caused the breach in the provisions of the interlocking contracts existing between" AI, @Wireless, and Verizon, and also "violated a number of affirmative or implied representations" to AI. (TPC ¶ ¶ 38-39) However, despite AI's conclusory reference to "interlocking contracts," the complaint does not indicate any privity of contract between AI and Verizon. AI is not a party to the contract between Verizon and @Wireless. Nor is AI a third-party beneficiary of that agreement. As to any third-party beneficiary claims,

> [a] party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.

*State of California Pub. Employees' Retirement Sys. v. Shearman & Sterling,* 95 N.Y.2d 427, 434, 718 N.Y.S.2d 256, 259 (2000) (citations omitted); *see also, Port Chester Elec. Const. Co. v. Atlas,* 40 N.Y.2d 652, 655, 389 N.Y.S.2d 327, 330 (1976) ("It is old law that a third party may sue as a beneficiary on a contract made for his benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts.")

It is well settled that sub-contractors and sub-agents are not third-party beneficiaries. *See, Subaru Distrib. Corp. v. Subaru of America, Inc.,* 425 F.3d 119, 125-126(2nd Cir.2005) ("Contract language referring to third parties as necessary to assist the parties in their performance does not therefore show an intent to render performance for the third party's benefit."); *see also, Artwear, Inc. v. Hughes,* 202 A.D.2d 76, 83, 615 N.Y.S.2d 689, 693 (1st Dept.1994) ("This court and others have consistently held in instances where the contract in issue makes clear that a third party will be retained to assist in the performance by the promisee that such third parties are not intended beneficiaries of the main contract."); *Brownell Steel, Inc. v. Great Am. Ins. Co.,* 28 A.D .3d 842, 813 N.Y.S.2d 550, 551 (3d Dept.2006) ("[A] subcontractor is not normally a third-party beneficiary of the contract between the owner and the general contractor."); *Capital Nat'l Bank of New York v. McDonald's Corp.,* 625 F.Supp. 874, 883 (S.D.N.Y.1986) (Holding that a McDonald's franchisee's lender who was adversely impacted after McDonald's terminated the franchise agreement was neither in privity with McDonald's nor a third-party beneficiary of the franchise agreement, but rather, was merely an incidental beneficiary of the franchise agreement.)

***6** Here, there is no indication that the agreement between Verizon and @Wireless was for the benefit of AI. Rather, AI is merely a sub-agent or subcontractor. Moreover, even if AI qualified as a third-party beneficiary to the agreement between Verizon and @Wireless, AI would still have no basis to recover against Verizon. AI admits that @Wireless breached the agreement, and it is clear that the agreement gave Verizon the right to terminate the agreement on that basis. *See, Artwear, Inc. v. Hughes,* 202 A.D.2d at 82, 615 N.Y.S.2d at 693 ("[A] third-party beneficiary, whose rights are derivative, is subject to the same defenses as are available to the contracting party.") In short, as a subagent, AI could not have had greater rights under the agreement with Verizon than @Wireless had, and the allegations in the TPC clearly indicate that Verizon was entitled to terminate the agreement with @Wireless. Accordingly, the contract claims against Verizon are dismissed.

Turning to the contractual claims against 5Linx, AI alleges that Jerabeck and @Wireless caused the breach of the "interlocking agreements" between Verizon, @Wireless, and AI, and that Jerabeck and 5Linx are "alter egos." [FN3] (TPC p. 27 ¶ 38; p. 29, ¶ 43) The law concerning the alter-ego doctrine is well settled:

> FN3. AI also alleges that 5Linx "collaborated in, directed, encouraged, consented to, permitted, ratified or approved" Jerabeck's actions. The Court will consider these allegations in connection with the claim for tortious interference with contract, however, to the extent that plaintiff is attempting to allege a concerted-action theory for breach of contract, it fails to state a claim. *See, Binder v. National Life of Vermont,* No. 02 Civ. 6411(GEL), 2003 W L 21180417 at *4 (S.D.N.Y. May 20, 2003) ("New York law permits a party to be held liable for another's tortious conduct if it has agreed to 'participate in a common plan' to commit a tortious act, and a tortious act is committed pursuant to that agreement. This theory of joint liability does not apply to breaches of contract, however.") (citation omitted).

> Corporations, of course, are legal entities distinct from their managers and shareholders and have an independent legal existence. Ordinarily, their separate personalities cannot be disregarded. In a broad sense, the courts do have the authority to look beyond the corporate form where necessary to prevent fraud or to achieve equity. More specifically, where a shareholder uses a corporation for the transaction of the shareholder's personal business, as distinct from the corporate business, the courts have held the shareholder liable for acts of the corporation in accordance with the general principles of agency. The determinative factor is whether 'the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends.

*Port Chester Elec. Const. Co. v. Atlas,* 40 N.Y.2d at 656, 389 N.Y.S.2d at 331 (citations omitted); *Rivera v. Citgo Petroleum Corp.,* 181 A.D.2d 818, 819, 583 N.Y.S.2d 159 (2nd Dept.1992) ("Generally, courts will only pierce the corporate veil and hold two corporations to constitute a single legal unit, where one is so related to, or organized, or controlled by, the other as to be its instrumentality or alter ego.")

In this case, AI alleges that Jerabeck, @Wireless, and 5Linx are "alter egos" of each other. (TPC p. 3, ¶ 9) Apart from this purely conclusory allegation of the parties' legal status, AI states that Jerabeck was "the President, Chief Executive Officer (CEO) [and] owner" of both @Wireless and 5Linx. (*Id.*), and further alleges that Jerabeck's photograph appeared on the websites of both @Wireless and 5Linx. (TPC pp. 7-9) Finally, AI alleges that Jerabeck made representations to Verizon concerning both companies and caused the breaches of the agreements between Verizon and @Wireless and between @Wireless and AI, respectively. (*Id.*) Claims of alter ego status need only satisfy the liberal notice pleading standard of Rule 8. *Rolls-Royce Motor Cars, Inc. v. Schudroff,* 929 F.Supp. 117, 122 (S.D.N.Y.1996). Nonetheless, the Court finds that the allegations of alter-ego status here are so conclusory that they fail to state a claim. *See, In re Currency Conversion Fee Antitrust Litigation,* 265 F.Supp.2d 385, 426 (S.D.N .Y.2003) ("[P]urely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under the liberal notice pleading standard.") Accordingly, AI's contract claims against 5Linx must be dismissed.

*Tortious Interference with Contract*

*7 The Court will now consider AI's claims for tortious interference with contract. As to that, "the tort of intentional interference with the performance of a contract requires proof of the following elements: a valid contract between plaintiff and a third party; defendant's knowledge of the contract; defendant's intentional procurement of a breach by the third party; and resultant damages." *Chu v. Dunkin' Donuts Inc.,* 27 F.Supp.2d 171, 173

(E.D.N.Y.1998) (citations omitted). A defendant intentionally procures a breach when he "knows of a valid ... contract" and "commits an intentional act whose probable and foreseeable outcome is that one party will breach the contract, causing the other party damage." *Leventhal v. Franzus Co., Inc.,* No. 88 CIV. 3547(MBM), 1988 WL 132868 at *7 (S.D.N.Y. Dec. 6, 1988).

Here, plaintiff has not alleged that Verizon induced or procured @Wireless to breach the sub-agency agreement, or any other agreement. Much to the contrary, AI alleges that Verizon was "not responsible, or even knowledgeable, about the actions of Jerabeck, @Wireless and 5Linx." (TPC ¶ 38) At most, AI alleges that Verizon's termination of its agreement with @Wireless adversely affected the sub-agency agreement between AI and @Wireless. [FN4] However, a tortious interference claim similar to this was rejected in the case of *Artwear, Inc. v. Hughes,* 202 A.D.2d at 85-86, 615 N.Y.S.2d at 694 - 695:

> FN4. Elsewhere in the complaint, AI insinuates that Verizon is somehow guilty of wrongdoing involving the removal of documents from a court file. However, the complaint appears devoid of any good faith factual basis for such an allegation.

> Artwear's cause of action for tortious interference with contractual rights, intertwined with its claim to third-party beneficiary status, fares no better.
>
> * * *
>
> While the amended complaint does allege a breach of the license agreement, it fails to allege that the Estate intentionally induced a breach of the sublicense agreement.
>
> * * *
>
> Artwear argues that neither it nor SNC was able to perform under the sublicense agreement because of the Estate's breach of the license agreement. Artwear's cause of action for tortious interference with contract is, therefore, by its own terms, based on the Estate's alleged breach of the license agreement, which breach brought about SNC's failure to perform the sublicense agreement. In reality, this is nothing more than a claim for damages incidentally flowing from the breach of the license agreement, to which Artwear was not a party and of which it is not, for the reasons indicated, a third-party beneficiary.
>
> * * *
>
> Thus, Artwear, a sublicensee ... cannot transform an alleged breach of the license agreement by the Estate, a party with which it is not in privity, into a tort claim against that party. Artwear's remedy is against the party with whom it dealt, SNC.

*Id.,* 202 A.D.2d at 85-86, 615 N.Y.S.2d at 694-695. In this case, AI's tortious interference claim against Verizon is even less meritorious than the claim that was dismissed in the Artwear case. That is, here, AI has not even alleged that Verizon breached the agreement with @Wireless, but instead, alleges just the opposite. Consequently, the tortious interference claim against Verizon is dismissed.

***8** As for the tortious interference claim against 5Linx, AI alleges that 5Linx "collaborated in, directed, encouraged, consented to, permitted, [and] ratified or approved" the "actions of Jerabeck." (TPC p. 30, ¶ 5) By that, the Court understands AI to be alleging that 5Linx and Jerabeck are jointly liable under a concerted-action theory. [FN5] As to that,

> FN5. The concerted action theory of liability is different than the alter ego theory. This proposed claim does not use the term "alter ego," and to the extent that AI may be attempting to state an alter ego claim, the Court finds that it fails to state a claim, for the reasons discussed above.

> [t]he theory of concerted action liability rests upon the tenet that all those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.

*Harris v. Stanley,* 21 A.D.3d 612, 613, 799 N.Y.S.2d 837, 838-839 (3d Dept.2005). As identified by the Second Circuit,

> [t]he elements of concerted-action liability are (1) an express or tacit agreement to participate in a common plan or design to commit a tortious act, (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort. In order to be liable for acting in concert with the primary tortfeasor ... the defendant must know the wrongful nature of the primary actor's conduct.

*Pittman by Pittman v. Grayson,* 149 F.3d 111, 122 - 123 (2nd Cir.1998) (citations and internal quotation marks omitted).

Applying these principles, the Court finds that the tortious interference claim against 5Linx is sufficient to meet the Federal Rules' liberal pleading requirements. Drawing all reasonable inferences in AI's favor, the TPC alleges that there was a contract between AI and @Wireless [FN6], of which Jerabeck was aware, which was premised on the fact that @Wireless was authorized to sell Verizon's products. The TPC can further be construed to allege that Jerabeck intentionally committed acts whose "probable and foreseeable outcome" was that Verizon would term inate@W ireless's ability to sell Verizon's products, which would also cause @Wireless to breach its agreement with AI. The TPC further alleges that 5Linx "collaborated" with Jerabeck, and "approved" and "encouraged" his actions in that regard. Consequently, the motion to dismiss the tortious interference claim against 5Linx is denied.

> FN6. As already discussed, the complaint fails to allege that there was any contractual privity between Verizon and AI. Therefore, to the extent that AI is alleging that 5Linx tortiously interfered with a contract between Verizon and AI, the claim must also fail.

*Actual Fraud and Constructive Fraud*

The Court will next consider AI's claims of actual fraud and constructive fraud. To prevail on a cause of action for actual fraud, a plaintiff must establish that a defendant made "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which was offered to deceive the other party and to induce him to act upon it, causing injury." *Klembczyk v. Di Nardo*, 265 A.D.2d 934, 936, 705 N.Y.S.2d 743, 744 (4th Dept.1999) (citation and internal quotation marks omitted). The elements of constructive fraud are the same as those for actual fraud, except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties. *Id.*, 265 A.D.2d at 936, 705 N.Y.S.2d at 744. Such a relationship requires a "high degree of dominance and reliance," and where the parties have an arm's length business relationship, a plaintiff's "subjective claims of reliance on defendants' expertise" are insufficient. *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 355, 777 N.Y.S.2d 62, 65 (1st Dept.2004) (citations omitted). Rule 9(b) of the Federal Rules of Civil Procedure requires that averments of fraud be "stated with particularity," which means that the complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir.2004)

***9** Based on these principles, AI's claims against Verizon must be dismissed. As for actual fraud, AI alleges in conclusory fashion that Verizon "made a number of affirmative or implied fraudulent misrepresentations," such as that Verizon would "protect" AI's business interest, and "would not without good cause" open a competing Verizon store near AI's location. Apart from the vagueness of the alleged statements themselves, which do not state a claim, AI does not allege who at Verizon allegedly made them, nor does it allege when or where they were made. Consequently, the allegations also fail to satisfy Rule 9(b). Moreover, to the extent that AI contends that the alleged statement concerning the opening of a competing shop was fraudulent, the Court disagrees, since Verizon did not open a store in Southington, Connecticut, until after the agreement between Verizon and @Wireless was terminated. Certainly, the termination of that agreement would have amounted to good cause for Verizon to open its own store. [FN7]

> FN7. In any event, it appears that Verizon expressly reserved the right to compete with @Wireless and its sub-agents. See, Agency Agreement § 2 ("Nothing herein shall restrict or prohibit Verizon Wireless from, in its sole discretion, offering Subscribers and potential Subscribers in the Area, through its direct sales force or otherwise, volume discounts, promotional offers, new or modified price plans or any other special offers.")

Similarly, the constructive fraud claim against Verizon also must be dismissed. As to this claim, AI seeks to hold Verizon liable for the actions of Jerabeck. (*See,* TPC p. 33) For example, AI states that Verizon "collaborated in, directed, encouraged, consented to, permitted, ratified, or approved" Jerabeck's actions, and that Verizon somehow "violated the trust and confidence, which they [AI] justifiably reposed in Jerabeck.". (*Id.*) However, AI's allegations against Verizon are deficient in several respects. First, as to the underlying tort allegedly committed by Jerabeck, the complaint merely makes the conclusory allegation that Jerabeck stood "in a confidential, fiduciary and special relationship" to AI. (TPC p. 17, ¶ 33) Such conclusory allegations are insufficient to plead a fiduciary relationship:

> The existence of fiduciary duties depends on the facts of a particular relationship. Usually, therefore, a claim alleging the existence of a fiduciary duty is

not subject to dismissal in a 12(b)(6) motion, given the generous pleading standard established in Fed.R.Civ.P. 8. Nevertheless, ... [a]llegations of reliance on another party with superior expertise, standing by themselves, will not suffice. To plead a cause of action alleging that defendants became fiduciaries, plaintiffs must allege at least some of the factors from which a court could conclude that such a relationship has been established. Plaintiffs' amended complaint merely alleges that "[a]s a consequence of undertaking to act as a dealer-manager, promoters, sellers, accountants and bankers regarding the offering of Pineloch limited partnership interests, defendants entered into a fiduciary relationship of trust and confidence with plaintiffs." Amended Complaint ¶ 94. Such a conclusory allegation does not satisfy Rule 8.

*Boley v. Pineloch Associates, Ltd.*, 700 F.Supp. 673, 681 (S.D.N.Y.1988) (footnote and citation omitted).

***10** Even assuming, *arguendo,* that AI could adequately state an underlying constructive fraud claim against Jerabeck, it has not adequately alleged concerted action between Jerabeck and Verizon. [FN8] For example, the totally conclusory assertions that Verizon " "collaborated in, directed, encouraged, consented to, permitted, ratified, or approved" Jerabeck's actions are contrary to the specific factual allegations in the complaint, which indicate that Verizon did *not* approve of Jerabeck's actions. [FN9] In fact, the TPC contains numerous factual statements describing how Verizon sought to stop Jerabeck from committing the very acts by which AI claims to have been injured. Moreover, it is clear to the Court that AI has no personal knowledge of what transpired between Verizon and Jerabeck, but rather, has based its allegations in that regard upon the allegations made by Verizon against @Wireless in the New Jersey district court proceeding discussed above. Even assuming, *arguendo,* that AI may rely on such hearsay in framing its complaint, Verizon's allegations in the New Jersey matter, as set forth in the TPC, provide no good faith basis for AI to allege that Verizon acted in concert with Jerabeck. Consequently, the fraud and constructive fraud claims against Verizon are dismissed.

FN8. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen,* 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dept.2003) (citations omitted).

FN9. *See, e.g.,* TPC p. 9, ¶ 29: "Verizon Wireless executives had not approved of Jerabeck's service on behalf of 5Linx, and in fact, had demanded that 5Linx cease the specific activities at issue ."; p. 9, ¶ 30: "@Wireless having again breached the agreements, [Verizon executive] Turco admonished Jerabeck.") As discussed earlier, AI alleges elsewhere in the TPC that Verizon was "not responsible, or even knowledgeable, about the actions of Jerabeck, @Wireless and 5Linx." (TPC ¶ 38)

Turning to the fraud and constructive fraud claims against 5Linx, the Court finds, first, that the allegations of fraud are not pled with particularity as required by Rule 9(b). To the extent that AI is attempting to allege that 5Linx actually made fraudulent statements, the TPC fails to provide any detail. (*See,* TPC pp. 24-25) Similarly, to the extent that AI is attempting to state a claim for concerted-action liability against 5Linx, based upon fraudulent statements made by Jerabeck, the TPC fails to describe Jerabeck's alleged statements with particularity. The only exceptions to that are the alleged e-mail by Jerabeck on September 10, 2004, and the conference call made by Jerabeck on September 21, 2004. (TPC pp. 5-6) As to those statements, though, AI has not explained how they induced reliance or caused injury. As for the constructive fraud claim, AI contends that Jerabeck breached a fiduciary duty, and that 5Linx "collaborated in, directed, encouraged, consented to, permitted, ratified, or approved" his actions. (TPC p. 23) However, as discussed above, AI fails to plead the existence of a fiduciary relationship between itself and Jerabeck. Moreover, AI fails to plead that 5Linx knowingly aided and abetted the alleged breach of fiduciary duty. *See, Kaufman v. Cohen,* 307 A.D.2d at 125-26, 760 N.Y.S.2d at 169-70 ("Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty.... A person knowingly participates in a breach of fiduciary duty only when he or she provides "substantial assistance" to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.") (citations omitted). Consequently, the fraud and constructive fraud claims against 5Linx are dismissed.

*Constructive Trust*

***11** The Court will now consider AI's constructive trust claims. As to that, it is well settled that four elements are required for a constructive trust: "(1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of the subject res made in reliance on that promise; and (4) unjust enrichment." *In re First Central Fin. Corp.*, 377 F.3d 209, 212 (2d Cir.2004) (citations omitted). As for the claim against Verizon, AI alleges that it "transferred property" to Verizon, "which st[ood] in a confidential, fiduciary and special relationship" to AI, "with the full expectation that Jerabeck and @Wireless would not wrongfully ... harm the opportunity for them generated by said business arrangements." (TPC p. 36, ¶ 35) AI further contends that Verizon now "holds any such property" as trustee for the benefit of AI. (*Id.* ¶ 36) These allegations against Verizon fail to adequately allege the existence of any confidential or fiduciary relationship between AI and Verizon. In general there is no fiduciary relationship between a franchisor and franchisee, let alone between two entities, such as AI and Verizon, who have no contractual privity. *See, Marcella & Co., Inc. v. Avon Prods., Inc.*, 282 A.D.2d 718, 719, 724 N.Y.S.2d 192, 193 (2nd Dept.2001) ( "[T]here is no fiduciary relationship between a franchisee and a franchisor.") (citation omitted). AI further fails to identify an express or implied promise by Verizon, fails to identify the res that is supposedly in Verizon's possession or how it came to be there, [FN10] and fails to explain how Verizon acted unjustly. [FN11] Accordingly, the constructive trust claim against Verizon is dismissed.

FN10. Though it is unclear, AI appears to suggest that Verizon is somehow in possession of the franchise fee that AI paid to @Wireless.

FN11. The purported claim for constructive trust against Verizon states that "5Linx," not Verizon, "collaborated in, directed, encouraged, consented to, permitted, ratified or approved" the actions of Jerabeck and @Wireless. (TPC p. 36, par35) To the extent that AI meant to allege that Verizon aided and abetted Jerabeck or @Wireless, the TPC fails to state a claim for the same reasons already discussed above.

Similarly, the constructive trust claim against 5Linx fails to state a claim. As to that, AI alleges that it had a "confidential, fiduciary and special relationship" with Jerabeck and @Wireless, which breached duties to AI and thereby became unjustly enriched, and that 5Linx "collaborated in, directed, encouraged, consented to, permitted, ratified or approved" the actions of @Wireless and Jerabeck. As already discussed, fiduciary duty claims are fact specific and often not subject to dismissal on a Rule 12(b)(6) motion. *Boley v. Pineloch Associates, Ltd.*, 700 F.Supp. at 681. However, AI has failed to properly allege the existence of any fiduciary relationship between itself and Jerabeck and/or @Wireless. Instead, the complaint indicates only the existence of an arm's length agent/subagent or franchisor/franchisee relationship. Accordingly, the constructive trust claim against 5Linx is dismissed.

*Violation of N.Y. General Business Law (GBL) § § 349-350*

AI next contends that Verizon and 5Linx violated New York's statutory prohibition against deceptive business practices and advertising. As to that, GBL § 349 prohibits deceptive business practices, while GBL § 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service." Significantly, claims under GBL § § 349 and 350 must involve conduct that was directed at the public at large. *Canario v. Gunn*, 300 A.D.2d 332, 333, 751 N.Y.S.2d 310, 311 (2d Dept.2002). Consequently, claims arising from private disputes are not actionable. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320, 639 N.Y.S.2d 283, 290 (1995) ("The conduct need not be repetitive or recurring but defendant's acts or practices must have a *broad impact on consumers at large;* private contract disputes unique to the parties would not fall within the ambit of the statute") (emphasis added, citation omitted). As for the requirement that the deceptive act have been "consumer oriented," "[t]he critical question ... is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer or a competitor." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2nd Cir.1995).

***12** In this case, there is no allegation that either Verizon or 5Linx engaged in false advertising, or any other deceptive trade practice, that was directed toward or that was injurious to the public. Nor does AI claim to have been directly injured by any such deceptive practices. At most, AI alleges that 5Linx made false statements on its website concerning its affiliation with Verizon. However, there is no allegation that AI was misled or otherwise injured as a result of those alleged misstatements. Accordingly, the claims pursuant to GBL § § 349 & 350 are dismissed.

*Negligent Misrepresentation*

The Court will now consider AI's claim for negligent misrepresentation against 5Linx. The elements of such a claim are that

> (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment. However, the alleged misrepresentation must be factual in nature and not promissory or relating to future events that might never come to fruition.

*Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 -21 (2nd Cir.2000) (citations omitted). As to the first of these elements,

> in order to determine the existence of a special relationship and duty in the context of a negligent misrepresentation claim, the Second Circuit has held that New York law requires a fact finder to consider the following three factors: "whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 103 (2d Cir.2001) (quotation marks and citation omitted). In *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996), the New York Court of Appeals explained that "[i]n the commercial context, a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information." 89 N.Y.2d at 263 (quotation marks and citation omitted). *In general, a simple commercial relationship, such as that between a buyer and seller or franchisor and franchisee, does not constitute the kind of "special relationship" necessary to support a negligent misrepresentation claim. See* *Dimon, Inc. v. Folium, Inc.*, 48 F.Supp.2d 359, 373 (S.D.N.Y.1999). A commercial relationship may become a special relationship, however, where "the parties enjoy a relationship of trust and reliance 'closer than that of the ordinary buyer and seller." ' *Polycast Tech. Corp. v. Uniroyal, Inc.*, No. 87 Civ. 3297, 1988 WL 96586, at *10 (S.D.N.Y. Aug. 31, 1988) (citations omitted). Courts have found a special relationship and duty, for example, where defendants sought to induce plaintiffs into a business transaction by making certain statements or providing specific information with the intent that plaintiffs rely on those statements or information.

***13** *Century Pacific, Inc. v. Hilton Hotels Corp., No.* 03 Civ. 8258(SAS), 2004 WL 868211 at *8 (S.D.N.Y. Apr. 21, 2004) (emphasis added); see also, *Adiel v. Coca-Cola Bottling Co. of New York, Inc .*, 95 CIV. 0725(WK), 1995 WL 542432 at *5 (S.D.N.Y. Sep. 13, 1995) ("Ordinarily, New York courts do not recognize a fiduciary relationship between a franchisee and franchisor.") "Courts in this circuit have held that a determination of whether a special relationship exists is highly fact-specific and generally not susceptible to resolution at the pleadings stage." *Century Pacific, Inc. v. Hilton Hotels Corp.*, 2004 WL 868211 at *8 (citation and internal quotation marks omitted). Nonetheless, "plaintiffs must allege at least some of the factors from which a court could conclude that such a relationship has been established." *Boley v. Pineloch Associates, Ltd.*, 700 F.Supp. at 681.

In the instant case, AI's negligent misrepresentation claim against 5Linx is based on statements allegedly made by Jerabeck. (*See,* TPC p. 32, ¶ 47) ("Jerabeck was careless, in which 5Linx, inter alia, collaborated in, directed, encouraged, consented to, permitted, ratified, or approved.") However, AI has not adequately pled the existence of a special or fiduciary relationship between Jerabeck and AI. AI also has not identified the particular statements upon which it bases this claim, or explained how it detrimentally relied on such a statement. [FN12] Nor has AI alleged that 5Linx knowingly induced or participated in Jerabeck's alleged breach of fiduciary duty. *See,* *Kaufman v. Cohen*, 307 A.D.2d at 125, 760 N.Y.S.2d at 169 ("A claim for aiding and abetting a breach of fiduciary duty requires ... that the defendant knowingly induced or participated in the breach.") The negligent misrepresentation claim against 5Linx is therefore dismissed.

> FN12. In this circuit, it is unclear whether or not Rule 9(b) applies to negligent misrepresentation claims. *See,* *Eternity*

> *Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.,* 375 F.3d 168, 188 (2nd Cir.2004) ("Rule 9(b) may or may not apply to a state law claim for negligent misrepresentation. District court decisions in this Circuit have held that the Rule is applicable to such claims, but this Court has not adopted that view.") (citation omitted). However, even assuming that 9(b) does not apply, plaintiff should at least identify the statement(s) upon which it is basing the claim.

*Leave to Re-plead*

Having determined that most of AI's claims should be dismissed, the Court must consider whether to grant AI leave to file an amended complaint. The granting of such leave is strongly favored:

> Without doubt, this circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under Rule 12(b)(6). Federal Rule of Civil Procedure 15(a) provides that "a party may amend the party's pleading ... by leave of court and leave shall be freely given when justice so requires." In interpreting this rule, this Court has indicated that where a plaintiff clearly has expressed a desire to amend, a lack of a formal motion is not a sufficient ground for a district court to dismiss without leave to amend. *See Oliver Schools, Inc. v. Foley,* 930 F.2d 248, 252-53 (2d Cir.1991) (remanding where plaintiff, faced with the Eleventh Amendment immunities of the named defendants, had requested leave to replead claims against the defendants in their personal capacities). And in *Ronzani v. Sanofi S.A.,* 899 F.2d 195 (2d Cir.1990) ... we ruled that the district court had abused its discretion in failing to allow repleading where the plaintiff had made no motion to replead but had noted in his opposition brief his desire to replead if the motion were granted. *Id.* at 198-99.

***14** *Porat v. Lincoln Towers Community Ass'n,* 464 F.3d 274, 2006 WL 2670387 at *2 (Second Cir. Sep. 18, 2006). On the other hand, a "plaintiff is not necessarily entitled to a remand for repleading whenever he has indicated a desire to amend his complaint, notwithstanding the failure of plaintiff's counsel to make a showing that the complaint's defects can be cured." *Id.* (citation omitted). Moreover, leave to amend should be denied where amendment would be futile. *Rubin v. Valicenti Advisory Services, Inc.,* 236 F.R.D. 149, 152 (W.D.N.Y.2006) ("Notwithstanding the generally lenient standard for permitting amendments, it is also well-settled that if the amendment proposed by the moving party is futile, "it is not an abuse of discretion to deny leave to amend.") (citation omitted).

Here, it would not be accurate to say that AI has requested leave to file an amended complaint in the event that the motions are granted. Rather, AI appears to assume that such leave will be granted. As to that, AI merely cites, in its briefs, the case of *Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2nd Cir.1988), for the proposition that, "When the court chooses to dismiss, it normally grants leave to file an amended pleading that conforms to the requirements of Rule 8." AI has not attempted to explain how it would amend the complaint if given the opportunity.

In deciding whether to permit AI to re-plead, the Court views the claims against Verizon and those against 5Linx very differently. In short, there appears to be at least a plausible basis for the claims against 5Linx, and a reasonable chance that AI could remedy the defects identified above. On the other hand, it does not appear that Verizon belongs in this lawsuit. In an abundance of caution, however, the Court will permit AI to re-plead its actual fraud claim against Verizon. As to that, the Court notes that, during oral argument, it questioned AI's counsel about the basis for its fraud claim against Verizon, noting that it appeared that AI was attempting to assert a theory of concerted action liability against Verizon, based upon statements made by Jerabeck. The following exchange took place:

> THE COURT: I am trying to understand the theory. Are you claiming that Jerabek's statements to your clients are somehow attributable--that Verizon is responsible for Jerabek's statements to your client[?]
> MR. ZYKO: Some of them might be, but my client will be prepared to testify at trial, that there were *actual employees of Cellco that made these representations to him ... representations that were made directly to him--to him, through him, to--for AI and his wife Julie, made by Cellco [Verizon] employees.*
> THE COURT: So you could--what you're telling me is that you could apply--I would agree that you haven't complied with the pleading requirements of rule 9, and you're saying you could. You're saying, if I gave you [a] chance to re plead, you could come in here and re plead in accordance with rule 9[?]
> ***15** MR. ZYKO: Your Honor--
> THE COURT: You're--
> MR. ZYKO: Yes. Yes.
> THE COURT: You're making that representation.
> MR. ZYKO: Yes, I am making that representation,

> I have to go back and review the [pleading] with my client, but my memory when I drafted the complaint, which is a while ago, my answer to that is yes.

(Court's Real Time Transcript of appearance on October 12, 2006) (emphasis added). The Court is admittedly somewhat skeptical, since it does not seem likely that learned counsel would have omitted such details, i.e., actual statements by Verizon, from the complaint if they actually existed. However, the Court will rely upon the representation of AI's counsel, and will permit AI to re-plead the actual fraud claim against Verizon, if further discussion between AI and its counsel indicate a good faith basis for asserting such a claim. Leave to re-plead as to the remaining claims against Verizon is denied, however, since it appears that amendment would be futile.

CONCLUSION

For all of the foregoing reasons, Verizon's motion is granted in its entirety, and all claims are dismissed with prejudice, except the claim for actual fraud, which is dismissed without prejudice. AI is permitted leave to file an amended pleading re-asserting that claim, in a manner that complies with Rule 9(b), within 20 days of the date of this Decision and Order. 5Linx's motion is denied as to the claim for tortious interference, but is otherwise granted. The claims against 5Linx pursuant to the N.Y. GBL are dismissed with prejudice, however, the remaining dismissed claims are dismissed without prejudice, and AI is permitted leave to file an amended pleading re-asserting those claims within 20 days of the date of this Decision and Order.

SO ORDERED.

Not Reported in F.Supp.2d, 2006 WL 3370696 (W.D.N.Y.)

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United States District Court,
S.D. New York.
In re WORLDCOM, INC. SECURITIES LITIGATION
**No. 02 Civ.3288 DLC, 05 Civ.55 DLC.**

March 7, 2006.

Chrisopher Garcia, for Plaintiff, pro se.

Martin London, Richard A. Rosen, Brad S. Karp, Eric S. Goldstein, Walter Rieman, Joyce S. Huang, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, N.Y. and Peter K. Vigeland, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, for Defendant Citigroup Global Markets, Inc. f/k/a Salomon Smith Barney.

*OPINION AND ORDER*

COTE, J.

***1** This Document Relates to: Christopher Garcia v. Citigroup Global Markets, Inc., No. 05 Civ. 55(DLC)

Plaintiff Christopher Garcia ("Garcia"), proceeding *pro se,* has sued Citigroup Global Markets, Inc. f/k/a Salomon Smith Barney ("Salomon") in connection with his trading in the securities of WorldCom, Inc. ("WorldCom"). Through his first amended complaint, filed on January 21, 2005 ("Complaint"), Garcia alleges that Salomon violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and committed fraud under the common law of Colorado. In the fourth tranche of motions to dismiss claims pleaded in actions consolidated before this Court as the WorldCom *Securities Litigation,* Salomon has moved to dismiss each of the three claims pleaded in the Complaint.

*Background*

The following facts are as alleged in the Complaint. Garcia purchased 1,000 shares of WorldCom stock through T.D. Waterhouse on February 8, 2002, and sold those shares on February 25 for a loss of approximately $1,000. Garcia made a second purchase of 2,000 shares on April 24, 2002, which resulted in a loss of over $4,000 when he sold them on May 14, 2002. In addition to the $5,000 in trading losses, Garcia seeks $15 million in punitive damages.

The Complaint alleges that Salomon analyst Jack Grubman ("Grubman") issued reports touting WorldCom stock in bad faith and without any reasonable basis, and that those reports inflated the price of WorldCom securities. These reports were distributed directly to Salomon clients and placed on the Salomon website. Garcia alleges that he "relied directly" on Grubman's statements about WorldCom stock, identifying a series of Grubman statements in reports issued between August 20, 1999 and January 29, 2002. In the last report in that series, Garcia alleges that Grubman advised investors that WorldCom was a "best play" even as the stock reached record lows. The Complaint rests in part upon the presumption of reliance established by the fraud on the market doctrine.

When Grubman downgraded his recommendation on WorldCom from a buy to "neutral" on April 22, 2002, WorldCom lost a third of its value. Garcia quotes the financial press as attributing the decline to the power of Grubman's "downgrade". Garcia also describes a February 27, 2002 *New York Times* report on the alleged conflicts that infected Salomon's recommendations on WorldCom, and the fact that Salomon was considering "downgrading" Grubman's role at Salomon. According to Garcia, an April 10, 2002 *Wall Street Journal* article reported that New York's Attorney General had subpoenaed Salomon as part of an investigation into analysts' and in particular Grubman's conflicts of interest.

*Discussion*

This Opinion presumes familiarity with the other Opinions issued in the WorldCom *Securities Litigation,* in particular *In re WorldCom, Inc. Sec. Litig.,* 294 F.Supp.2d 392 (S.D.N.Y.2003) (motion to dismiss class action); *In re WorldCom, Inc. Sec. Litig.,* 382 F.Supp.2d 549 (S.D.N.Y.2005) (motion to dismiss complaint filed by consortium of actuarial pension funds). Salomon argues principally that Garcia has failed to plead actual reliance, that he has pleaded facts that show that he did not reasonably rely on Salomon analyst reports in making his April 2002 purchase, and that Colorado does not recognize a fraud on the market theory.

***2** Garcia's claims addressed to his April 24, 2002 purchase of WorldCom stock must be dismissed. The

Complaint alleges that before Garcia made his April 24 purchase, Grubman downgraded his analysis of WorldCom securities to a neutral rating, and prominent press articles reported Salomon's conflicts of interest. The facts as alleged by Garcia require dismissal of the fraud claims since his own Complaint demonstrates that he could not have reasonably relied on Grubman's neutral rating of WorldCom securities in making this second purchase.

Garcia argues in opposition to this prong of the motion that a neutral rating is not a recommendation to sell. [FN1] It is also not a recommendation to buy. As of the time that Grubman assigned a neutral rating, Garcia owned no WorldCom stock. Having pointed in his Complaint to evidence that WorldCom's stock was being battered, that Grubman's integrity was being impugned in the national press, that he and his employer were under a publicly disclosed investigation by the New York State Attorney General, and that Grubman was no longer recommending that investors buy WorldCom securities, Garcia's pleading cannot be construed as asserting reliance on Grubman or Salomon for the April 24 purchase. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir1995) (In the context of a motion to dismiss, "[g]eneral, conclusory allegations need not be credited ... when they are belied by more specific allegations of the complaint.").

FN1. Garcia's opposition brief relies on a reference to Salomon's rating system that is not in his Complaint. According to his brief, Salomon's neutral rating indicated a range of results that ran from a 10% loss to a 10% gain.

Turning to the February purchase, the Complaint has not alleged actual reliance. In his opposition to this motion, Garcia emphasizes the Complaint's allegation that Grubman's reports were posted on the Salomon website. The Complaint does not allege, however, that Garcia read those website reports before making his purchases of WorldCom stock. The naked allegation of reliance is insufficient in the context of the fraud claims, as they are articulated by Garcia, to carry his burden under Rule 9(b), Fed.R.Civ.P. Because Colorado has not recognized a fraud on the market theory, his common law fraud claim must be dismissed. *See Schwartz v. Celestial Seasonings, Inc.*, 185 F.R.D. 313, 317-18 (D.Colo.1999) (holding that under Colorado law, reliance cannot be assumed based on the fraud on the market theory); *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1104 (Colo.1995) (declining to "import[ ]" the fraud on the market doctrine "into Colorado law").

Garcia asks for an opportunity to amend his pleading in order to "add specifics" as to what Salomon does not "understand". He asserts that "[h]aving not been a client of [Salomon] the only way to get access to [Grubman's] reports is through" Salomon's website. It remains unclear even from this passage in Garcia's brief that he can allege in good faith that he actually read Salomon's website and relied upon Grubman's reports before making his February 8 purchase. Garcia will be given an opportunity, however, to amend his Complaint to make such a representation if he is able to do so.

***3** Punitive damages are unavailable under the Exchange Act. Should Garcia be able to allege facts sufficient to assert actual reliance on Grubman's reports in making his February purchase, then Garcia may reassert a claim for punitive damages. It is premature to address the extent to which Garcia's request for such damages is viable.

*Conclusion*

Garcia's claims addressed to his April 2002 purchase of WorldCom securities are dismissed with prejudice.

In connection with Garcia's claims addressed to his February 2002 purchase of WorldCom stock, the motion to dismiss the federal securities law claims is denied. If Garcia wishes to pursue his Colorado law claim, he may file an amended pleading by April 7, 2006, to replead actual reliance on the Grubman analyst reports.

SO ORDERED:

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